Supreme Court, U.S.
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NO. ____

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON,

Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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156 Wash. 2d 543, 130 P.3d 352

Supreme Court of Washington,
En Banc.

STATE of Washington ex rel. WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION,

Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,

Appellant,

Gary Davenport, Martha Lofgren, Walt Pierson, Susannah Simpson, and Tracy Wolcott, Petitioners, individually and on behalf of all other nonmembers similarly situated,

v.

Washington State Education Association,

Respondent.

No. 74268-5, 74316-9.

March 16, 2006.

IRELAND, J.*

*Justice Faith Ireland is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

¶ 1 In these consolidated cases, we review RCW 42.17.760, which governs a labor union's ability to use agency shop fees, the fees paid by educational employees who are not union members. Both cases stem from an Evergreen Freedom Foundation (Evergreen) complaint with the Public Disclosure Commission (PDC) that the Washington Educational Association (WEA) violated RCW 42.17.760 (hereafter § 760).

¶ 2 In the first consolidated case, the trial court found that WEA had intentionally violated § 760 and assessed $590,375 in penalties and costs. The Court of Appeals reversed, holding that RCW 42.17.760 is unconstitutional. We affirm the Court of Appeals.

¶ 3 In the second consolidated case, plaintiffs contend that chapter 42.17 RCW provides them a private right of action to recover for violations of § 760. Plaintiffs also assert tort claims based on violations of § 760. The trial court agreed that § 760 provides a private right of action, but the Court of Appeals reversed because it had held § 760 unconstitutional. The Court of Appeals remanded the case for dismissal. We affirm the Court of Appeals.

FACTUAL BACKGROUND

¶ 4 WEA is the exclusive bargaining agent for approximately 70,000 Washington State educational employees. Membership in WEA is voluntary. However, both members and nonmembers must contribute to WEA for the costs related to collective bargaining.[1] Per statute, members pay dues to the union; nonmembers pay agency shop fees, which are equivalent to member dues. RCW 41.59.100[2]; RCW 41.56.122.

¶ 5 A portion of members' dues goes to support political and ideological causes, which are unrelated to the union's collective bargaining activities on behalf of all employees. These expenses are typically called nonchargeable expenses. Nonmembers who do not wish to support these nonchargeable activities may obtain a rebate of that portion of their fees that was used for

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[1] It is well settled that a union, which is obliged to act on behalf of all employees in the bargaining unit, may charge nonunion employees to bear their fair share of the costs of the representation. *Air Line Pilots Ass'n v. Miller,* 523 U.S. 866, 118 S. Ct. 1761, 140 L. Ed. 2d 1070 (1998). The dissent takes pains to point out that many states have passed so called "right to work laws" which have not been held unconstitutional. This argument is irrelevant to the issue in this case and inconsistent with "Washington's long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wash. 2d 291, 300, 996 P.2d 582 (2000).

[2] RCW 41.59.100 provides, in part: "If an agency shop provision is agreed to, the employer shall enforce it by deducting from the salary payments to members of the bargaining unit the dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues."

nonchargeable activities. The process by which the union rebates this amount to dissenting nonmembers was established by the United States Supreme Court in *Chicago Teachers Union v. Hudson,* 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986).

¶ 6 Twice each year, WEA sends a "*Hudson* packet" to each nonmember. The *Hudson* packet includes a letter notifying the employee of his or her right to object to paying fees for nonchargeable expenditures. The packet gives the nonmember three choices: (1) pay agency shop fees equivalent to 100 percent of dues; (2) object to paying 100 percent and receive a rebate of nonchargeable expenditures, as calculated by WEA; or (3) object to paying 100 percent and challenge WEA's calculations of nonchargeable expenditures. The packet also provides financial information about WEA and its activities. During the years 1996 to 2000, WEA had approximately 3,500 nonmembers per year, which is approximately 5 percent of the total number of persons represented by WEA.

¶ 7 When a nonmember challenges WEA's calculation of nonchargeable expenditures, an arbitrator determines the amount of the nonmember's fees that should be rebated. Pending the outcome of the arbitration, WEA escrows any fees that are reasonably in dispute. The WEA rebates to the employee the amount determined by the arbitrator, and transfers the remainder to the WEA general account. During the years 1996 to 2000, the rebates ranged from $44 to $76. Clerk's

Papers (CP) at 839. Nonmembers who did not object and did not request rebates did not receive rebates. Their fees were transferred from escrow to WEA's general account. Political expenditures were made from this account pursuant to a 1996 agreement with the PDC. At issue are the fees paid by the nonobjecting nonmembers.

PROCEDURAL BACKGROUND

¶ 8 This is the latest in a series of actions by Evergreen against WEA. These cases include *State ex rel. Evergreen Freedom Foundation v. Washington Education Ass'n*, 140 Wash.2d 615, 999 P.2d 602 (2000) and *State ex rel. Evergreen Freedom Foundation v. Washington Education Ass'n*, 111 Wash.App. 586, 49 P.3d 894 (2002).

¶ 9 The current action began in August 2000, when Evergreen filed a complaint with the PDC, alleging that WEA had violated RCW 42.17.760. The complaint asserted that WEA failed to get the affirmative authorization of all nonmembers before using the nonmembers' fees for political purposes, as required by the statute. In order to avoid yet another lawsuit, WEA entered into a stipulation with the PDC. In that stipulation, WEA acknowledged that it had violated § 760 during the 1999-2000 fiscal year. The PDC referred the case to the attorney general for prosecution.

¶ 10 The State filed suit against WEA in October 2000, alleging WEA had violated § 760 during the previous five years, 1996 to 2000. Both parties

moved for summary judgment. The trial court granted the PDC's motion for partial summary judgment, ruling § 760 is constitutional and it "requires affirmative authorization from agency fee payers ... and defendant's *Hudson* procedures do not satisfy this requirement." CP at 349-50. The court ruled that it was a question of fact whether WEA had "used" those agency fees for political purposes. The case proceeded to a bench trial on the issue of whether the WEA had "used" for political purposes the fees of nonmembers who had failed to object by completing and returning the form contained in the *Hudson* packet.

¶ 11 At trial, three experts testified concerning WEA's accounting procedures and whether WEA had used the fees of the nonobjecting nonmembers. Two of the three experts, including the parties' jointly retained expert, testified that WEA had not used the fees of the nonobjecting nonmembers for political expenditures.

¶ 12 However, the trial court concluded that WEA had used those fees. The court assessed a sanction of $200,000, calculated by multiplying $25 by the approximately 4,000 nonmembers who had failed to respond to the *Hudson* packet. The court then doubled the fine to $400,000, as allowed by RCW 42.17.400(5). The court awarded the PDC costs and fees of $190,375 for a total judgment against WEA of $590,375. The trial court also issued a permanent injunction, precluding WEA from collecting the full amount of agency fees mandated by RCW 41.59.100 and requiring WEA to institute

new procedures for segregating the amounts collected from members and the amounts collected from nonmembers.

¶ 13 WEA appealed. On appeal, Division Two of the Court of Appeals held § 760 unconstitutional because its "affirmative authorization requirement unduly burdens unions." *State ex rel. Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n*, 117 Wash.App. 625, 640, 71 P.3d 244 (2003). The State sought review in this court.

¶ 14 The other consolidated case arose in March 2001, when several educational employees, Gary Davenport, Martha Lofgren, Walt Pierson, Susannah Simpson, and Tracy Wolcott (Davenport), who are not members of the union, filed a class action against WEA on behalf of present or former public school employees. Davenport claims a private right of action under the Public Disclosure Act (PDA). Davenport seeks a refund of that portion of agency shop fees used for political expenditures. Davenport also alleges tort claims for breach of fiduciary duty, conversion, and fraudulent concealment. The trial court dismissed the breach of fiduciary duty claim but denied dismissal of the other claims. In addition, the trial court ruled that § 760 provides a private right of action. The trial court then stayed further proceedings while the parties sought interlocutory appeal. The Court of Appeals granted review. After holding § 760 unconstitutional in the consolidated case, the Court of Appeals remanded the Davenport

case to the trial court for dismissal. Davenport petitioned for review in this court.

¶ 15 This court granted the State's and Davenport's petitions for review and consolidated the two cases. We affirm the Court of Appeals.

ISSUES

1. Does WEA's *Hudson* process satisfy RCW 42.17.760's requirement of affirmative authorization?

2. Does the requirement of affirmative authorization render RCW 42.17.760 unconstitutional?

3. Does chapter 42.17 RCW create a private right of action?

ANALYSIS

1. Does WEA's *Hudson* process satisfy RCW 42.17.760's requirement of affirmative authorization?

¶ 16 Enacted in 1992 as part of Initiative 134 (I-134), the Fair Campaign Practices Act, § 760 restricts the ability of unions to use for political purposes the agency fees paid by employees who have not joined the union. Laws of 1993, ch. 2, § § 1-36. RCW 42.17.760 provides:

> A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

WEA argues that the *Hudson* process satisfies the requirement of affirmative authorization because it provides each individual nonmember the opportunity to object, to obtain a refund, and to prevent fees from being used by WEA, even temporarily, for political purposes. The State contends that the plain language of the statute makes clear that each individual nonmember must provide actual consent and that failure to respond to the *Hudson* packet does not constitute consent.

¶ 17 Prior to this suit, no court had construed the affirmative authorization requirement of § 760. The PDC, the agency charged with implementing the PDA, had not issued any regulations interpreting § 760 or brought any enforcement actions concerning § 760. In addition, despite several requests that the PDC provide guidance to labor organizations on how to comply with § 760's affirmative authorization requirement, the PDC had not given any direction.

¶ 18 In interpreting an initiative, the court looks at the voters intent and the language of the initiative as the average informed lay voter would

interpret it. *In re Estate of Hitchman,* 100 Wash.2d 464, 467, 670 P.2d 655 (1983). Words are given their ordinary meaning. *Wash. State Coalition for the Homeless v. Dep't of Soc. & Health Servs.,* 133 Wash.2d 894, 905, 949 P.2d 1291 (1997). If the language used is fairly susceptible to more than one interpretation, the statute is ambiguous. *Sacred Heart Med. Ctr. v. Dep't of Revenue,* 88 Wash.App. 632, 636, 946 P.2d 409 (1997). If the statute is ambiguous, the intent of the electorate may be ascertained from the language of the initiative as well as the official voters pamphlet. *State v. Thorne,* 129 Wash.2d 736, 763, 921 P.2d 514 (1996).

¶ 19 Because § 760 does not define "affirmative authorization," it is unclear whether the *Hudson* process satisfies the authorization requirement. The plain language seems to indicate a nonmember must provide an expression of positive authorization. Failure to respond to the *Hudson* packet may be considered acquiescence, but it would not fulfill the affirmative authorization requirement. The difference is that affirmative authorization seems to indicate that the member must say "yes," instead of failing to say "no."

¶ 20 In this case, the language of the voters pamphlet does not assist us because it also fails to clarify the term "affirmative authorization" and fails to identify what type of authorization was intended. Indeed, the voters pamphlet describes the requirement as "individual authorization," not "affirmative authorization."

¶ 21 The State admits that § 760 does not require written authorization. We agree, otherwise the statute would have so stated. Where written authorization is required in the chapter, the statute specifies written authorization. Compare the language of § 760, which forbids the use of nonmember fees in support of political activities "unless affirmatively authorized by the individual," to the language of RCW 42.17.680(3), which forbids deducting "a portion of an employee's wages or salaries for contributions to political committees or for use as political contributions except upon *written* request of the employee." RCW 42.17.680(3)(emphasis added). Where different language is used in different places within a statute, it is presumed there is a difference in intent. *State v. Roberts,* 117 Wash.2d 576, 586, 817 P.2d 855 (1991). Therefore, not only does § 760 not require written authorization, we presume that written authorization is not what is intended.

¶ 22 At oral argument, the State was unable to specify what form of authorization would satisfy the requirement of affirmative authorization, except to say that the *Hudson* process was not sufficient. The State asserts that the voters intended to provide to nonmembers more protection of First Amendment rights than is provided under the *Hudson* process approved by the Supreme Court. However, the State has failed to provide any evidence of such intent. The single line in the voters pamphlet concerning the agency shop fees provision does not mention either the constitution

or the protection of the nonmember. The voters pamphlet's only reference to the current § 760 is the comment that under I-134, "agency shop fees could not be used for political purposes without individual authorization." This bare description does not indicate what form the authorization should take or whether the *Hudson* process satisfies the requirement of affirmative authorization.

¶ 23 We have previously discussed the intent of the voters in passing I-134. For example, we declared that "[t]he intent of the people of this State in enacting Initiative 134 can be determined from the declarations in RCW 42.17.610 and .620." *Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 140 Wash.2d at 637, 999 P.2d 602. Those declarations of intent indicate that the principal thrust of I-134 was to protect the integrity of the election process from the perception that elected officials are improperly influenced by monetary contributions and the perception that individuals have an insignificant role to play. *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wash.2d 245, 293, 4 P.3d 808 (2000) (Talmadge, J., dissenting). Thus, the intent of the statute is to protect the public, not individual employees. *Crisman v. Pierce County Fire Prot. Dist. No. 21*, 115 Wash.App. 16, 23, 60 P.3d 652 (2002). The requirement of individual authorization does not advance this intent any more than the *Hudson* process.

¶ 24 Where a statute is ambiguous and this court is able to construe it in a manner which renders it constitutional, the court is obliged to do so. *State v. Dixon*, 78 Wash.2d 796, 804, 479 P.2d 931 (1971). However, having construed the statute as requiring more than a nonresponse to a *Hudson* packet, we must next examine the constitutionality of § 760.

2. Does the requirement of affirmative authorization render RCW 42.17.760 unconstitutional?

¶ 25 A party challenging the constitutionality of a statute bears the burden of establishing its unconstitutionality beyond a reasonable doubt. *State ex rel. Heavey v. Murphy*, 138 Wash.2d 800, 808, 982 P.2d 611 (1999). A statute is presumed constitutional, and all doubts are resolved in favor of constitutionality. *Dixon*, 78 Wash.2d at 804, 479 P.2d 931.

¶ 26 The first and fourteenth amendments to the United States Constitution protect the freedom of an individual to associate for the purpose of advancing beliefs and ideas. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); *Elrod v. Burns*, 427 U.S. 347, 355-57, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). The practice of persons banding together to make their political voices heard is deeply embedded in the American political process. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981). "Its value is that by collective effort individuals can make their views

known, when, individually, their voices would be faint or lost." *Id.*

¶ 27 The freedom to associate encompasses the freedom to contribute financially to an organization for the purpose of spreading a political message. *Id.* at 296, 102 S.Ct. 434. "Making a contribution ... enables like-minded persons to pool their resources in furtherance of common political goals." *Buckley v. Valeo,* 424 U.S. 1, 22, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Restrictions on expenditures in political campaigning "implicate fundamental First Amendment interests." *Id.* at 23, 96 S.Ct. 612; *see also Wash. State Republican Party,* 141 Wash.2d at 256, 4 P.3d 808.

¶ 28 On the other hand, equally protected is a person's right not to be compelled to support political and ideological causes with which he or she disagrees. *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group,* 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). The freedom of association includes the converse right not to be compelled to associate. *Good v. Associated Students of Univ. of Wash.,* 86 Wash.2d 94, 100, 542 P.2d 762 (1975). Freedom of speech includes the freedom not to speak or to have one's money used to advocate ideas one opposes. *Keller v. State Bar of Calif.,* 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990). "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind

and his conscience rather than coerced by the State." *Abood,* 431 U.S. at 234- 35, 97 S.Ct. 1782.

¶ 29 In a series of cases, the United States Supreme Court has addressed these competing rights--the right to freely associate for the purpose of political speech and the right to be free from forced association--in the context of the political speech of labor organizations. The result is an approach which strikes a balance between those who disagree with the labor organization's political activities and those who support the political activities. The approach accommodates the dissenting nonmember by providing an easy and prompt method of registering his or her objection and recouping any portion of fees which might otherwise be used by the union for political purposes. At the same time, the approach crafted by the Court makes it simple for one who supports the political causes of the union, whether member or nonmember, to assert his or her right of association.

¶ 30 In *International Association of Machinists v. Street,* 367 U.S. 740, 749, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), the Court considered whether a union "receiving an employee's money should be free, despite that employee's objection, to spend his money for political causes which he opposes." The Court recognized the government's interest in supporting the important role unions play in preserving workplace harmony. Compulsory dues or fees to the union were justified by the union's obligation to represent all employees, whether

members or not, as well as the union's desire to avoid free-riders. Therefore, the Court affirmed the union's right to collect fees from all employees who benefit from the union's collective bargaining activities.

¶ 31 The Court held, however, that compulsory union dues may not be used to support political causes if the member disagrees with those causes. On the other hand, "the majority also has an interest in stating its views without being silenced by the dissenters." *Id.* at 773, 81 S.Ct. 1784.

¶ 32 The Court stated that the appropriate remedy must reconcile the majority and dissenting interests in the area of political expression, protecting both interests "to the maximum extent possible without undue impingement of one on the other," and taking into account the administrative difficulty of accommodating each group. *Id.* Any remedies, however, would properly be granted only to those employees who had made known to the union that they did not desire their funds to be used for political causes to which they object. "[D]issent is not to be presumed--it must affirmatively be made known to the union by the dissenting employee." *Id.* at 774, 81 S.Ct. 1784.

¶ 33 In *Abood,* the Court affirmed that the principles of *Street* applied to public employees represented by a collective bargaining agency. The Court held that the union was allowed to use members' dues for purposes other than collective bargaining, provided the money did not come from

employees who objected to the causes supported. *Abood,* 431 U.S. at 222, 97 S.Ct. 1782. "[T]he Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 235-36, 97 S.Ct. 1782. The Court affirmed that the burden is on the employee to make his objection known.

¶ 34 Then in *Hudson* and *Ellis*,[3] while once again affirming that the burden is on the employee to register his dissent to the union's political activities, the Court outlined the procedures that are constitutionally required to safeguard the First Amendment rights of that dissenting employee. An employee who is given a simple and convenient method of registering dissent has not been compelled to support a political cause and has not suffered a violation of his or her First Amendment rights.[4]

¶ 35 With these principles in mind, we consider the constitutionality of the restriction imposed by §

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[3] *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 104 S. Ct. 1883, 80 L. Ed. 2d 428 (1984).

[4] Neither party has provided an analysis or argument to show why, in this context, the state constitutional provision protecting the rights of free speech and association should be construed more broadly than the federal provision. Therefore, we interpret the state constitutional clause coextensively with its parallel federal counterpart. *Nelson v. McClatchy Newspapers, Inc.*, 131 Wash. 2d 523, 538, 936 P.2d 1123 (1997).

760 on the political speech of the union, its members, and its nonmembers. Regulation of First Amendment rights is always subject to exacting judicial scrutiny. *Citizens Against Rent Control*, 454 U.S. at 294, 102 S.Ct. 434. The State bears the burden of demonstrating that the restriction is narrowly tailored to achieve a compelling governmental interest. *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wash.2d 618, 624, 957 P.2d 691 (1998). "Such burdens are rarely met." *Id.*

¶ 36 Under § 760, the union is prevented from spending any portion of a nonmember's agency fees for political causes without the affirmative authorization of the nonmember. The WEA contends, and a majority at the Court of Appeals agreed, that the statute is unconstitutional because its requirement of affirmative authorization amounts to an impermissible presumption that each nonmember objects to the union's use of his or her fees for political activities. The State argues that although the Supreme Court has placed the burden on the dissenting nonmember to *assert* his or her First Amendment rights, it is nevertheless constitutionally permissible for § 760 to shift the burden to the union to *protect* the First Amendment rights of dissenting nonmembers. The Court of Appeals held that by presuming the dissent of nonmembers, § 760 upsets the balance of members' and nonmembers' constitutional rights in the context of a union's expenditures for political activities. Section 760 impermissibly shifts to the union the burden of the nonmembers' rights. This

has the practical effect of inhibiting one group's political speech (the union and supporting nonmembers) for the improper purpose of increasing the speech of another group (the dissenting nonmembers).

¶ 37 A presumption of dissent violates the First Amendment rights of both members and nonmembers. The State argues that § 760 has no impact on the First Amendment rights of members because § 760 only requires the affirmative authorization of nonmembers. However, this argument denies the obvious, significant expense involved in complying with § 760. It is disingenuous to argue that § 760 has no impact on members' ability to assert their collective political voice. Campaign finance legislation can create insurmountable organizational and financial hurdles for organizations attempting to engage in political speech, rendering the legislation unconstitutional. *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 254-55, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). The weight of the administrative burden on the union is an important consideration in resolving the balance of member and nonmember First Amendment rights. *See, e.g., Waters v. Churchill,* 511 U.S. 661, 671, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) (court should consider the cost of procedural safeguards on First Amendment rights); *Grunwald v. San Bernardino City Unified Sch. Dist.*, 994 F.2d 1370 (9th Cir.1993) (requirements of accommodating dissenting nonmembers must be practical).

Dissenters may not silence the majority by the creation of too heavy an administrative burden.

¶ 38 In this case, WEA presented evidence that the procedures required by the State's interpretation of § 760 would be extremely costly and would have a significant impact on the union's political activities. *See* Report of Proceedings (RP) at 175-76, 187, 203, 208. The State concedes that written permission is not required. But even without a written permission requirement, the State's position would require individual contact with each nonmember who did not respond to the *Hudson* packet. Therefore, we reject the State's argument that transferring the burden from the dissenting nonmember to the union would have no impact on the union's ability to assert its political voice.

¶ 39 A presumption of dissent violates the First Amendment rights of nonmembers as well. A presumption of dissent fails to respect the nonmember's First Amendment rights as "running both ways." *Wagner v. Prof'l Eng'rs in Calif. Gov't,* 354 F.3d 1036, 1043 (9th Cir.2004). It assumes that because an employee has not joined the union, he or she disagrees with the union's political expenditures. However, there are numerous and varied reasons why employees choose not to join a union. *Leer v. Wash. Educ. Ass'n,* 172 F.R.D. 439, 446-47 (W.D.Wash.1997) (nonmembers do not have unanimity of purpose). Employees may choose to remain nonmembers for many reasons unrelated to political expression. For those nonmembers who agree with the union's political expenditures, §

760's presumption of dissent presents an unconstitutional burden on their right to associate themselves with the union on political issues. We are bound to provide at least as much protection to the union's members and nonmembers as that provided by the First Amendment: " '[S]tates have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress.' " *Wash. State Republican Party*, 141 Wash.2d at 264, 4 P.3d 808 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 48-49, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985)).

¶ 40 Nevertheless, the State argues that we need not adhere to the balance of First Amendment rights as articulated in *Street, Abood*, and their progeny.[5] The State argues that those cases are different because they do not involve a state statute that expressly calls for affirmative authorization of nonmembers. The State also places great emphasis on the fact that § 760 was enacted by the citizens of Washington. However, the voters cannot do through initiative what is constitutionally prohibited. *Amalgamated Transit Union Local 587 v. State*, 142 Wash.2d 183, 204, 11 P.3d 762 (2000).

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[5] Similarly, the dissent asserts that balancing members' and nonmembers' rights is a "false" requirement created by the majority, rather than an approach created by the Supreme Court. On the contrary, as other courts have recognized, "the balance of interests underlying all of the Supreme Court's pronouncements on the subject of agency shop fees" must be applied when determining the use of those fees for political purposes. *Weaver*, 970 F.2d at 1533; *see e.g., Miller*, 103 F.3d at 1253 (union's process must strike "a balance between the right to solicit political contributions and the co-equal right not to contribute").

In reviewing the constitutionality of a statute, it is irrelevant that a statute is enacted by the voters rather than a legislative body. *Id.*

¶ 41 Moreover, while our state may provide greater protection to its citizens, such as dissenting nonmembers, than is provided by the federal constitution, it cannot do so at the expense of the rights of other citizens, such as members and supporting nonmembers. The State's argument transfers the burden of asserting First Amendment rights from the dissenting nonmembers and places it on the supporting nonmembers and the union. Increased protection for nonmembers, as asserted by the State, tips the scales of First Amendment rights in favor of the dissenting nonmember, while increasing the burden on the nonmember who supports the union's political causes and also on the union, which must bear the administrative costs. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley,* 424 U.S. at 48-49, 96 S.Ct. 612.

¶ 42 In addition, there is no indication that in voting for I-134, the voters intended to provide more protection for nonmembers than that offered under federal constitutional principles. Rather, as we have previously stated, the principal thrust of I-134 was to protect the integrity of the election process from the perception that elected officials are improperly influenced by monetary contributions and the perception that individuals

have an insignificant role to play. *Wash. State Republican Party*, 141 Wash.2d at 293, 4 P.3d 808. The intent of the statute was to protect the public, not individual employees. *Crisman*, 115 Wash.App. at 23, 60 P.3d 652 (the wording and history of chapter 42.17 RCW indicate that its goal is to protect the public); *see also Nelson*, 131 Wash.2d at 532, 936 P.2d 1123 ("Initiative 134 ... was aimed at repairing the political process.").

¶ 43 The Ninth Circuit engaged in a similar analysis in *Mitchell v. Los Angeles Unified School District*, 963 F.2d 258 (9th Cir.), *cert. denied*, 506 U.S. 940, 113 S.Ct. 375, 121 L.Ed.2d 287 (1992). In *Mitchell*, plaintiffs were nonmembers who, like the nonmembers here, failed to object to the union's use of a portion of agency shop fees for nonchargeable expenditures. The district court issued an injunction, requiring the union to obtain the affirmative consent of each individual nonmember before using that nonmember's fees for political purposes.

¶ 44 The Ninth Circuit reversed, holding that requiring an opt-in system "would unduly impede the union in order to protect 'the relatively rare species' of employee who is unwilling to respond to the union's notifications but nevertheless has serious disagreements with the union's support of its political and ideological causes." *Id.* at 263. The court held it would be an unconstitutional burden to require all those who agree with the union's political activities to affirmatively consent. *Id.* The *Mitchell* court quoted the United States Supreme

Court's statement in *Street,* that the union should not be sanctioned in favor of an employee who makes no complaint regarding the use of his or her money. *Id.* at 260. In addition, the court quoted from a California Supreme Court decision that reached the same conclusion in a similar case: "[E]ach nonmember has a right to prevent the use of his or her service fee for purposes beyond the union's representational obligations. Since ... that additional right is an aspect of the right of an employee to refuse to participate in a union's activities ..., it must be affirmatively asserted or else it is waived." *Id.* at 262 (quoting *Cumero v. Pub. Employment Relations Bd.,* 49 Cal.3d 575, 590, 262 Cal.Rptr. 46, 778 P.2d 174 (1989)).

¶ 45 Likewise, the Sixth Circuit held that the Supreme Court has set out a "hierarchy of interests," which places the burden on the nonmember to make his objection known. *Weaver v. Univ. of Cincinnati,* 970 F.2d 1523, 1532 (6th Cir.1992), *cert. denied,* 507 U.S. 917, 113 S.Ct. 1274, 122 L.Ed.2d 668 (1993). The *Weaver* court stated that "[a]n 'opt-in' procedure would greatly burden unions while offering only a modicum of control to nonunion employees whose procedural rights have already been safeguarded by *Hudson.*" *Id.* at 1533. An opt-in provision impermissibly shifts the balance of interests underlying all of the Supreme Court's pronouncements. *Id.*

¶ 46 The dissent incorrectly states that the Sixth Circuit has explicitly affirmed the constitutionality of an opt-in statute similar to § 760. Dissent at

368 (citing *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir.1997)). However, the statute at issue in *Miller* is not similar to § 760. Washington's counterpart to the Michigan statute at issue in *Miller* is RCW 42.17.680(3), which we construed in one of Evergreen's previous suits against WEA. *See State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 140 Wash.2d 615, 999 P.2d 602 (2000). The provision at issue in *Miller* was the Michigan statute's prohibition of reverse checkoff, a collection system that automatically deducts contributions from a member's paycheck without his or her prior approval. Like the Michigan statute at issue in *Miller*, RCW 42.17.680(3) restricts the ability of various groups, including corporations and labor groups, from making direct deductions from an employee's wages. *Miller* did not involve a statute like § 760, and *Miller* is inapplicable to this case.[6]

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[6] The dissent sees no distinction between *Miller* and the current case. However, use of agency shop fees was not at issue in *Miller* and Michigan does not have a statute that specifically applies only to agency shop fees. Furthermore, we note that the primary issue in *Miller* concerned applying to unions the statutory restrictions against reverse checkoff, which were already applied to corporations, nonprofits, and other groups. The *Miller* court held that the Michigan statute "applies evenhandedly" to unions, corporations, and other entities. *Miller*, 103 F.3d at 1251. The parties have not raised, and we do not address, any argument concerning § 760's application solely to labor organizations while nonprofit, corporate, and other groups are not similarly subject to affirmative authorization requirements. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 110 S. Ct. 1391, 108 L. Ed. 2d 652 (1990) (statute that restricts corporate political expenditures, but not labor organization's political expenditures, was justified, in part, by ability of fee payer to avoid paying for political activities of a labor organization whereas shareholders cannot dissociate themselves from corporation's political activities).

¶ 47 The United States Supreme Court has held that a union has the right to use nondissenting nonmember fees for political purposes. *Abood*, 431 U.S. at 240, 97 S.Ct. 1782 (quoting *Bhd. of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113, 122, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963)). The State has failed to even attempt to justify § 760, which it is required to do when regulating First Amendment rights. In fact, a restriction on the First Amendment rights of WEA must be justified by a *compelling* governmental interest. Here, the only interest asserted is additional protection for nonmembers' First Amendment rights. However, there is no indication or argument that WEA is compelling nonmembers to support political activities or preventing nonmembers from asserting their First Amendment rights.

¶ 48 The Supreme Court has indicated that a nonmember has a right to be free from compelled support of a political cause the nonmember does not agree with. As the Supreme Court has held, there is no compelled support if the union utilizes the *Hudson* procedures. Given that there is no compelled support, it does not appear that there is any governmental interference with First Amendment rights of nonmembers for § 760 to protect against. Certainly the State has not provided any evidence of a compelling governmental interest that justifies the restriction on WEA from using the fees of the nondissenting nonmembers.

¶ 49 Judge Robin J. Hunt in her dissent at the Court of Appeals opines that while "opt-in" procedures have not been found to be constitutionally required, the procedure is not constitutionally infirm. *State ex rel. Pub. Disclosure Comm'n v. Wash. Educ. Ass'n,* 117 Wash.App. 625, 644, 71 P.3d 244 (2003) (Hunt, J., concurring in part, dissenting in part). She argues that the cases we cite, *Street, Abood, Mitchell,* and others, create a constitutional floor, but not a ceiling. Even if this argument were accepted, when the State acts in a way that affects the associational and free-speech rights of individuals, in addition to having a compelling reason, its legislation must be narrowly tailored. RCW 42.17.760 is not narrowly tailored especially when examined in light of recent United State Supreme Court authority.

¶ 50 In *Boy Scouts of Am. v. Dale,* 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000), the United States Supreme Court set forth the test for determining whether a government regulation improperly violates a group's right of expressive association. Because § 760 regulates the relationship between the union and agency fee payers with regard to political activity, the *Boy Scouts* analysis should be applied here. Under the *Boy Scouts* test, we must evaluate whether § 760's opt-in provision would significantly burden the union's expressive activity. *Boy Scouts,* 530 U.S. at 653, 120 S.Ct. 2446. If so, then we must analyze whether § 760's opt-in provision is narrowly tailored to support a compelling state interest that

is unrelated to the suppression of free speech. *Id.* at 648, 120 S.Ct. 2446. We conclude that the union's expressive activity is significantly burdened by § 760's opt-in requirement. We also conclude that any compelling state interest in protecting dissenters' rights, could be met by less restrictive means other than the § 760 opt-in procedure. The union's *Hudson* procedures amount to a constitutionally permissible alternative that adequately protects both the union and dissenters. Because RCW 42.17.760 is not narrowly tailored, we hold that the statute is unconstitutional.

¶ 51 The dissent complains that the narrowly tailored issue was not argued or briefed and that we should not rely on *Boy Scouts.* However, this is specifically argued in Respondent WEA's brief to this court. Resp't Br. at 14. That the *Boy Scouts v. Dale* case was not cited does not preclude this court from considering this important case. "[T]his court has the inherent discretionary authority to reach issues not briefed by the parties if those issues are necessary for decision." *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers,* 151 Wash.2d 203, 213, 87 P.3d 757 (2004) (quoting *City of Seattle v. McCready,* 123 Wash.2d 260, 269, 868 P.2d 134 (1994)). Moreover, "[T]his court has frequently recognized it is not constrained by the issues as framed by the parties if the parties ignore a constitutional mandate, a statutory commandment, or an established precedent." *City of Seattle v. McCready,* 123 Wash.2d 260, 269, 868 P.2d 134 (1994).

¶ 52 In 2000, the United States Supreme Court analyzed whether application of New Jersey's public accommodation law to require the Boy Scouts to admit James Dale, a homosexual gay rights activist, violated the Boy Scouts' First Amendment right of expressive association. *Boy Scouts,* 530 U.S. at 643, 647, 120 S.Ct. 2446. The Court noted that government actions that unconstitutionally burden a group's right of expressive association "may take many forms," one of which was forcing a group to accept certain unwanted members. *Id.* at 648, 120 S.Ct. 2446. The Court then applied a multistep analysis and concluded (1) that the Boy Scouts engaged in expressive activity, (2) that forced inclusion of Dale would significantly burden the Boy Scouts' expression, and (3) that application of New Jersey's public accommodations law in that case ran afoul of the Boy Scouts' constitutional freedom of expressive association. *Id.* at 656, 120 S.Ct. 2446.

¶ 53 While this case involves regulation of the use of agency shop fees, rather than regulation of the group's membership, the essence of RCW 42.17.760 is state regulation of the relationship between the union and agency fee payers with regard to political speech.

¶ 54 Under *Boy Scouts,* in order to determine whether § 760 violates the union's freedom of expressive association, we must first determine whether the union engages in expressive activity. *Boy Scouts,* 530 U.S. at 656, 120 S.Ct. 2446. It is clear from the record that the WEA engages in

political and ideological activities not related to collective bargaining or contract administration. Moreover, § 760 specifically regulates the expenditure of agency shop fees "to influence an election or to operate a political committee." Thus, it seems indisputable that the union engages in expressive activity and § 760 regulates the union's expressive association with agency fee payers. *See Boy Scouts,* 530 U.S. at 650, 120 S.Ct. 2446.

¶ 55 We must next determine whether § 760 opt-in requirement, significantly burdens the union's ability to express its viewpoint. The *Boy Scouts* Court emphasized that courts "must also give deference to an association's view of what would impair its expression." *Boy Scouts,* 530 U.S. at 653, 120 S.Ct. 2446.

¶ 56 RCW 41.59.060(2) provides that if an agency shop agreement becomes effective, a fee that is equivalent to union dues will be deducted from the salary of employees in the bargaining unit. *See also* RCW 41.59.100 (providing for limited exceptions not at issue here). Thus, under the agency shop provisions, the union is entitled to collect a fee equivalent to 100 percent of union dues from nonmembers in the bargaining unit. RCW 41.59.100.

¶ 57 RCW 42.17.760 then encumbers the use of such funds by prohibiting their expenditure for political speech absent affirmative authorization by the agency fee paying nonmember. Notably, the statute acknowledges that the fees are in the

union's possession but places restrictions upon the *use* of the union's funds for political speech. RCW 42.17.760.

¶ 58 The union's *Hudson* procedures protect dissenters' rights not to participate in the union's political speech. Twice a year, the union mailed a *Hudson* packet to agency fee payers. The packet contained detailed information about the union's expenditures and the right to object to nonchargeable expenditures. The packet offered three options. A nonmember could: (1) pay agency shop fees equal to 100 percent of union dues, (2) pay agency shop fees, but object to WEA's political expenditures and receive a rebate of nonchargeable expenditures as calculated by the union, or (3) object to the WEA's political expenditures and challenge the WEA's calculation of nonchargeable expenditures before an impartial arbitrator. RCW 42.17.760 significantly changes this process by requiring the union to forgo the use of the portion of agency fees that would go toward political expenditures *unless* the nonmember affirmatively authorizes use for political purposes, rather than allowing the union to use that portion of the agency fee for political speech absent objection.

¶ 59 The union contends that § 760's affirmative authorization requirement significantly burdens its expressive association with nonobjecting agency fee payers. At trial, a union expert testified that it would double the complexity of the dues collection system if fee payers were to pay a different amount than members. The union's additional efforts to

attain affirmative authorization would impose further administrative burden. Even if the union were to hold the amount allocated to political activity in escrow while seeking affirmative authorization, the lack of access to those funds could impact the timeliness of the union's political speech. Given the *Boy Scouts* requirement that we give deference to the union's view of what would impair its political expression and given the long recognized, highly protected nature of political speech, we conclude that RCW 42.17.760 significantly burdens the union's right of expressive association. *See Boy Scouts,* 530 U.S. at 653, 120 S.Ct. 2446; *see also Meyer v. Grant,* 486 U.S. 414, 425, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988) (political speech is at the core of the First Amendment freedom).

¶ 60 Finally, we must consider whether RCW 42.17.760 is narrowly tailored to support a compelling government interest that is unrelated to suppression. *Boy Scouts,* 530 U.S. at 648, 120 S.Ct. 2446. The protection of dissenters' First Amendment rights is a compelling interest and this interest is not rooted in a desire to suppress the union's political speech for suppression's sake. However, the federal case law previously extensively cited reveals that § 760's opt-in provision is not narrowly tailored to protect this interest. *Hudson,* 475 U.S. 292, 106 S.Ct. 1066; *Abood,* 431 U.S. 209, 97 S.Ct. 1782; *Street,* 367 U.S. 740, 81 S.Ct. 1784; *Weaver,* 970 F.2d 1523; *Mitchell,* 963 F.2d 258. As noted previously, the United States Supreme Court and other federal

courts have concluded that a constitutionally acceptable alternative is the opt-out system previously implemented by the union. *See, e.g., Street,* 367 U.S. at 774, 81 S.Ct. 1784; *Abood,* 431 U.S. at 235-36, 97 S.Ct. 1782; *Mitchell,* 963 F.2d at 262-63. Even if these cases do not contain a constitutionally based prohibition *against* opt-in systems, they do reveal a less restrictive alternative means for protecting dissenters' rights. Under the *Boy Scouts* analysis, § 760 significantly burdens the union's expressive association, requiring the statute to survive strict scrutiny. *See Boy Scouts,* 530 U.S. at 648, 120 S.Ct. 2446. The constitutionally acceptable opt-out alternative is significant in that it reveals that protection of dissenters' rights can be achieved through means significantly less restrictive of the union's associational freedoms than RCW 42.17.760's opt-in requirement. *See id.* In sum, RCW 42.17.760 regulates the relationship between the union and agency fee payers with regard to political expression. Therefore, we apply the framework set forth in *Boy Scouts* to determine whether § 760 violates the union's right of expressive association. The union engages in expressive activity and RCW 42.17.760's opt-in requirement significantly burdens the union's association with agency fee payers with regard to its political speech. Accepting the argument that protection of dissenters' rights is a compelling state interest, the opt-out procedure is a less restrictive constitutionally permissible alternative. RCW 42.17.760's opt-in procedure is not narrowly tailored to advance the State's interest in

protecting dissenters' rights, and thus, the statute is unconstitutional.

3. Does chapter 42.17 RCW create a private right of action?

¶ 61 Because Davenport's claims in the consolidated case are founded on an alleged violation of § 760, we do not reach either Davenport's claim that chapter 42.17 RCW implies a private right of action or Davenport's tort claims. We therefore affirm the Court of Appeals' remand of Davenport to the superior court for dismissal.

CONCLUSION

¶ 62 We hold that RCW 42.17.760 is unconstitutional. We affirm the Court of Appeals in each case.

C. JOHNSON, MADSEN, BRIDGE, CHAMBERS and OWENS, JJ., concur.

SANDERS, J. (dissenting).

> That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical.[1]

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[1] Thomas Jefferson, *Religious Liberty Guaranteed: Bill for Establishing Religious Freedom, 1779, in* A Documentary History *Of* Religion *In* America 231 (Edwin S. Gaustad ed., 3d ed. 2003) (emphasis omitted).

¶ 63 The majority turns the First Amendment on its head. Unions have a statutory, not constitutional, right to cause employers not only to withhold and remit membership dues but also to withhold and remit fees from nonmembers in an equivalent amount.[2] Absent this statutory mechanism for the withholding and remission of agency fees (or membership fees for that matter), there is no right, constitutional or otherwise, for the union to require it. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223, 97 S.Ct. 1782, 1793, 52 L.Ed.2d 261 (1977).

¶ 64 Many other states have markedly different statutory schemes: Some entirely bar union security agreements and outlaw agency shops as well.[3]

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[2] RCW 41.59.060(2) ("If an agency shop provision is agreed to and becomes effective pursuant to RCW 41.59.100, except as provided in that section, the agency fee equal to the fees and dues required of membership in the exclusive bargaining representative shall be deducted from the salary of employees in the bargaining unit."); RCW 41.59.100 ("A collective bargaining agreement may include union security provisions including an agency shop . . . If an agency shop provision is agreed to, the employer shall enforce it by deducting from the salary payments to members of the bargaining unit the dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues. . . .").

[3] *See* Ala. Code §§ 25-7-6, 25-7-30 to 25-7-36 (Supp. 1992); Ariz. Rev. Stat. Ann. Const. art. XXV (West 1984) and §§ 23-1301 to 23-1303 (West 1995); Ark. Code Ann. §§ 11-3-301 to 11-3-304 (Michie Supp. 1996); Fla. Stat. Ann. Const. art. 1, § 6 (West 1991); Ga. Code Ann. §§ 34-6-20 to 34-6-28 (1998); Idaho Code Ann. §§ 44-2001 to 44-2012 (1997); Iowa Code Ann. §§ 731.1 to 731.5 (West 1993); Kan. Stat. Ann. Const. art. 15, § 12 (1988); La. Rev. Stat. Ann. §§ 23:981 to 23:985 (West 1998); Miss. Code Ann. § 71-1-47 (1995);

¶ 65 Should the legislature of the State of Washington choose to repeal the mandatory withholding provisions of RCW 41.59.060 and .100, there would be no constitutional impediment to doing so. And no party to this proceeding claims there is.

¶ 66 However the existence of these mandatory withholding statutes does raise a very definite constitutional problem insofar as the statute is used to compel the *nonmember* to support the political advocacy of the union without his consent. Nearly every case cited by the majority concerns precisely that eventuality. However that constitutional problem can no longer arise in the state of Washington by virtue of a further statute, RCW 42.17.760, which provides in its entirety:

> A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or

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Neb. Rev. Stat. Const. art. XV, § 13 (1995); Nev. Rev. Stat. Ann. §§ 613.230 to 613.300 (Michie 1996); N.C. Gen. Stat. §§ 95-78 to 95-84 (1997); N.D. Cent. Code §§ 34-01-14, 34-08-04 (1987); S.C. Code Ann. §§ 41-7-10 to 41-7-90 (Law Co-op. 1986); S.D. Codified Laws Const. art. VI, § 2 (Michie 1978) and §§ 60-8-3 to 60-8-8 (Michie 1993); Tenn. Code Ann. §§ 50-1-201 to 50-1-204 (1991); Tex. Lab. Code Ann. §§ 101.051 to 101.053 (West 1996); Utah Code Ann. §§ 34-34-01 to 34-34-17 (1997); Va. Code Ann. §§ 40.1-58 to 40.1-69 (Michie 1994); Wyo. Stat. Ann. §§ 27-7-108 to 27-7-115 (Michie 1997). Thirteen of these states outlaw agency shops as well as union shops. There is no indication that any state has been held to have violated union members' rights by foreclosing mandatory collection of fees from nonmembers.

> expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

¶ 67 There is nothing ambiguous about this statute. No labor organization may use agency fees for political purposes absent "affirmative authoriz[ation]" by the individual. Nonaction or acquiescence is not "affirmative authoriz [ation]."

¶ 68 Given that the legislature could constitutionally repeal the whole statutory scheme allowing withholding in the first place, I find it nearly beyond comprehension to claim that the legislature, or the people acting through their sovereign right of initiative, could not qualify these statutes to ensure their constitutional application.

¶ 69 In short, the majority turns the First Amendment on its head to invalidate a state statute enacted to further protect the constitutional rights of nonunion members who are required to pay agency fees as the price of their employment.

¶ 70 While the First Amendment protects the right to organize and to express ideas on behalf of an organization, it "does not impose any affirmative obligation on the government to listen, to respond, or ... to recognize the association and bargain with it." *Smith v. Ark. State Highway Employees*, 441 U.S. 463, 465, 99 S.Ct. 1826, 1828, 60 L.Ed.2d 360 (1979). *See also Brown v. Alexander*, 718 F.2d 1417, 1421-22 (6th Cir.1983). Following from this

basic premise, there is no constitutional right to have the government deduct union dues (and, by logical extension, agency fees) from paychecks. *Ark. State Highway Employees v. Kell,* 628 F.2d 1099 (8th Cir.1980).

¶ 71 "Although the loss of payroll deductions may economically burden the [union] and thereby impair its effectiveness, such a burden is not constitutionally impermissible." *S.C. Educ. Ass'n v. Campbell,* - 883 F.2d 1251, 1256 (4th Cir.1989). "[T]he First Amendment does not impose an affirmative obligation on the state to assist the program of an association by providing payroll deduction services." *Id.* at 1257. The Fourth Circuit, examining whether payroll deductions were constitutionally required, quoted the United States Supreme Court, " '[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right." ' *Id.* at 1256 (quoting *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)). The court concluded by stating, "the state's failure to authorize payroll deductions for the [union] does not deny [union] members the right to associate, to speak, to publish, to recruit members, or to otherwise express and disseminate their views." *Id.* at 1257.

¶ 72 The Ohio legislature eliminated wage checkoffs for the support of any "candidate, separate segregated fund, political action committee, legislative campaign, political party, or ballot issue." Ohio Rev.Code § 3599.031(H). The United States Court of Appeals for the Sixth

Circuit found this constitutional. *Toledo Area AFL-CIO Council v. Pizza,* 154 F.3d 307, 319-21 (6th Cir.1998).

¶ 73 Therefore, it would be perfectly constitutional if the State chose to eliminate the payroll deduction for collection of agency shop fees altogether. How then could merely placing a procedural condition on the collection of a small portion of such shop fees (those that would be used to influence an election or to operate a political committee) violate the constitution?

¶ 74 The majority chooses not to address this line of cases. Instead it distorts cases delineating the requirements protecting dissenting union members and nonmembers from having their dues used to support political activities with which they disagree to do the opposite: limit the State's ability to protect such dissenters.

¶ 75 Simply put, all of the cases cited by the majority involve claims by dissenters that certain steps were required to protect their constitutional right *not* to associate and not to have their money spent supporting political positions with which they disagreed.[4] [FN4] I cannot improve upon Judge

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[4] *Mitchell v. Los Angeles Unified School District,* 963 F.2d 258 (9th Cir. 1992) is no different. That case concerned the First Amendment *right of nonunion employees* to withhold financial support from union political activity. The court held the constitutional right of the nonunion employees was adequately protected by an opportunity to "opt-out" of full dues payment through an agency fee. The constitutional rights of the union were never at issue.

Hunt's dissent from the case below: "[T]hese cases do not support the converse, advanced by the majority here, that an 'opt-in' provision such as Washington's is constitutionally barred." *State ex rel. Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n*, 117 Wash.App. 625, 642, 71 P.3d 244 (2003) (Hunt, J., dissenting).[5] [FN5] Judge Hunt's learned dissent cogently analyzes each of the cases relied upon by the majority and reaches the correct conclusion.[6]

¶ 76 Our majority takes "dissent is not to be presumed"[7] out of the context in which it was written--the context of unions categorically violating the rights of dissenters. That language

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[5] *See also* Irving M. Copi & Carl Cohen, Introduction To Logic 219-20 (9th ed. 1994) (converse of a given proposition not necessarily valid).

[6] *See State ex rel. Wash. State Pub. Disclosure Comm'n*, 117 Wash. App. at 642-44, 71 P.3d 244 (Hunt, J., dissenting), analyzing *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 81 S. Ct. 1784, 6 L .Ed. 2d 1141 (1961); *Bhd. of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113, 83 S. Ct. 1158, 10 L. Ed. 2d 235 (1963); *Abood*, 431 U.S. 209, 97 S.Ct. 1782; *Ellis v. Bhd. of Ry.*, 466 U.S. 435, 104 S. Ct. 1883, 80 L. Ed. 2d 428 (1984); *Mitchell*, 963 F.2d 258. While Judge Hunt did not examine *Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), that case arose in the identical context to the others: a claim that certain procedures, such as affirmative consent, were constitutionally *required* to protect dissenters' rights. *See Weaver*, 970 F.2d at 1531. All of these cases dealt with the constitution a floor--a minimum level of process needed to protect dissenters' rights. None of these cases dealt with the constitution as a ceiling limiting the discretion of legislators, or the people acting as legislators, in providing further protection to dissenters.

[7] *Street*, 367 U.S. at 774, 81 S. Ct. 1784; *Abood*, 431 U.S. at 238, 97 S. Ct. 1782.

simply served to limit the actions a union must undertake *in the absence of a statutory scheme.* The holdings of all the cases cited by the majority amount to a simple proposition: the constitution requires *at least* an opt-out scheme to protect dissenters' rights.[8] None of these cases stand for the proposition that the constitution limits a different legislative approach to protecting dissenters' rights, including an opt-in scheme.

¶ 77 From the majority's misconstruction of the "dissent is not to be presumed" language a false "balance" requirement is invented. Other than general paeans to the right of association, the majority cites no other precedent for its holding that the "balance" between the associational rights of dissenters and nondissenters is upset by requiring one to register assent, rather than register dissent.[9] Again, if the elimination of a

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[8] Even the language quoted by Justice Ireland demonstrates this: " '[T]he Constitution *requires* only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object.' " Majority at 359 (quoting *Abood*, 431 U.S. at 235-36, 97 S. Ct. 1782) (emphasis added). Further, *Abood* was a plurality opinion, and the concurring justices either explicitly chose not to address alternative remedies for the violations of dissenters' rights, remedies such as RCW 42.17.760 (*see Abood*, 431 U.S. at 244, 97 S. Ct. 1782 (Stevens, J., concurring)), or explicitly stated that the constitution does not *require* employees to "declare their opposition to the union and initiate a proceeding" in order to vindicate their First Amendment rights. *Abood*, 431 U.S. at 245, 97 S. Ct. 1782 (Powell, J., concurring).

[9] And even the cases cited as interpreting the "presumption of dissent" are misrepresented. *Wagner v. Professional Engineers in California Government*, 354 F.3d 1036, 1043 (9th Cir. 2004) is cited for the proposition that "[a] presumption of dissent fails to respect the nonmember's First Amendment rights as 'running both ways.' " Majority at 360 (quoting *Wagner*, 354 F.3d at 1043). Yet the issue

payroll deduction does not abridge the constitutional rights of union members and nonobjecting nonmembers to associate, it is inconceivable that requiring assent as a precondition to using funds generated by a payroll deduction abridges such rights.

¶ 78 In fact, an "opt-in" legislative scheme has explicitly been constitutionally upheld. In *Michigan State AFL-CIO v. Miller,* 103 F.3d 1240 (6th Cir.1997), the Sixth Circuit upheld a statute that read:

> "[A] labor organization may solicit or obtain contributions for a separate segregated fund . . . on an automatic basis, including but not limited to a payroll deduction plan, only if the individual who is contributing to the fund *affirmatively consents to the contribution* at least once in every calendar year."

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discussed in that section of *Wagner* was whether the proper remedy for an inadequate *Hudson* notice (where no statutory scheme required assent prior to use) was return of the nonchargeable amounts to all fee payers, including those who did not object, or whether the proper remedy was a new, proper notice with a renewed opportunity to object and then to receive a refund with interest. The case had nothing to do with whether requiring assent prior to use of nonobjecting nonmembers' payroll deductions was constitutional. Indeed, the case stresses protection of dissenters in absence of a statutory scheme protecting them: "The fundamental right at issue is the right to be informed before making a choice whether to pay for non-chargeable expenditures." *Wagner*, 354 F.3d at 1043.

Id. at 1248-1249 (quoting Mich. Comp. Laws Ann. § 169.255(6) (West 1966)).

¶ 79 The statutory scheme in Michigan prohibited labor unions from making political contributions from general funds, requiring them to maintain a "segregated" fund for such contributions. *Id.* at 1244. Thus, in order to solicit or obtain funds that would be used for political purposes--even from its own members, let alone nonmembers--the union had to obtain "affirmative consent" for the deduction every calendar year.

¶ 80 This is a more restrictive scheme than the Washington statute at issue since it applies to all union members while the Washington statute applies only to nonmembers.[10] But the statute mirrors Washington's in requiring "affirmative consent"--substantively identical to "affirmative authorization"-- before using payroll deductions for political purposes. And even given the Michigan statute's broader effects in applying to union members, the Sixth Circuit stated:

> [T]he suggestion that asking people to check a box once a year unduly interferes with the speech rights of

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[10] The majority's attempt to distinguish *Miller* on the basis that Washington has a statute, RCW 42.17.680(3), limiting union members' payroll deductions is baffling. The fact that Washington also has a statute regulating union member payroll deductions (though in a different manner than Michigan's) doesn't affect the central premise of *Miller*-- that an "opt-in" system regarding payroll deductions does not violate the First Amendment.

> those contributors borders on the frivolous.

Id. at 1253.

¶ 81 The majority's treatment of this case borders on the inexplicable. It claims that the primary issue in *Miller* was the equal application of the reverse checkoff to unions, corporations, non-profits, and other groups. Majority at 362 n. 6. It was nothing of the sort. The three sections of the opinion are labeled "Facts" (*id.* at 1243), "Intervention" (*id.* at 1245), and "The First Amendment and § 169.255(6)" (*id.* at 1248). There are no sections involving equal protection challenges.[11]

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[11] The challenge in *Miller* was to both associational and speech rights. *Miller*, 103 F.3d at 1250. Similarly, the majority frames the issue in both political speech and associational terms. Majority at 357. But while the majority chooses to focus on the line of United States Supreme Court cases concerning associational (and nonassociational) rights, the Sixth Circuit focused on the free speech cases. Under that line of cases, the Sixth Circuit looked at whether the requirement of affirmative consent for a payroll deduction was a content-neutral restriction on the potential speech of union members who would have been funded by the payroll deduction. *Id.* at 1250-53. The majority determined that the restriction on speech was content-neutral, and in making that determination the court examined whether the statute was an invidious "attempt to limit contributions made to separate segregated funds or to favor one class of voters over another." *Id.* at 1251. The court determined that there was no invidious purpose because the "statute applies evenhandedly." *Id.* I of course agree that there is no violation of free speech rights in limiting a payroll deduction system and of course no violation of associational rights, as outlined above.

¶ 82 As *Miller* recognized, the suggestion that a legislative choice to protect dissenting nonmembers by requiring affirmative authorization before using their agency shop fees to influence an election or to operate a political committee violates the First Amendment to the United States Constitution "borders on the frivolous."

¶ 83 The majority claims this statute violates the First Amendment associational rights of the *union*, citing *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000).

¶ 84 This argument's flaw is at its foundation: association is a two way street requiring a mutual desire to associate by all concerned. But here nonunion employees have elected *not* to associate. This does not violate the associated rights of the union or its members since it had no constitutional right to compel membership much less monetary support from nonmembers in the first place.

¶ 85 Moreover, this argument for unconstitutionality was never advanced by the parties and is therefore not properly considered by the court. *See* RAP 9.12 (limiting review of summary judgment to "evidence and issues called to the attention of the trial court"); *see also Nelson v. McGoldrick*, 127 Wash.2d 124, 140, 896 P.2d 1258 (1995); *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wash.2d 640, 649, 835 P.2d 1030 (1992) (refusing consideration of issues not raised before trial court); *cf. Tiffany Family Trust Corp. v. City of Kent*, 155 Wash.2d 225, 240, 119 P.3d 325

(2005) (refusing consideration of 42 U.S.C. § 1983 claim raised only in reply brief).

¶ 86 However even if it is properly before the court, it is not meritorious since this statute does not apply to union members only nonmembers who must pay agency fees because of their *refusal* to join the union. The right of these nonunion employees to refuse to join the union is itself protected by the First Amendment right of association as " '[f]reedom of association ... plainly presupposes a freedom not to associate.' " *Boy Scouts*, 530 U.S. at 648, 120 S.Ct. 2446; *Good v. Associated Students of Univ. of Wash.*, 86 Wash.2d 94, 104, 542 P.2d 762 (1975). *Boy Scouts* protected the right of nonassociation. Were this statute to apply to union dues from voluntary union members, the analysis might be arguable. But it doesn't, and it isn't.

¶ 87 The majority confuses the analysis further by referring to "the union's expressive association with agency fee payers," majority at 363, and "its [union's] expressive association with nonobjecting agency fee payers." *Id.* at 364. But there is *no* association between the union and agency fee payers because by definition these individuals have refused to join (associate with) the union. The absence of membership defeats any claim that the regulation of statutorily required monetary support can possibly violate the right of union members to freely associate with one another for political advocacy. Rather it puts in jeopardy the First Amendment right of nonmembers to refuse to

associate with a union which uses their money to advance a political agenda with which they might disagree. *That* is the concern of the First Amendment in this context, as it is the even more protective concern of RCW 42.17.760.

> "Our Government has no more power to compel individuals to support union programs or union publications than it has to compel the support of political programs, employer programs or church programs. And the First Amendment, fairly construed, deprives the Government of all power to make any person pay out one single penny against his will to be used in any way to advocate doctrines or views he is against, whether economic, scientific, political, religious or any other."

Good, 86 Wash.2d at 101, 542 P.2d 762 (quoting *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 791, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) (Black, J., dissenting)).

¶ 88 I dissent.

ALEXANDER, C.J., and FAIRHURST, J., concur.

117 Wash. App. 625, 71 P.3d 244

Court of Appeals of Washington,
Division 2.

STATE of Washington ex rel. WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION,

Respondent,

v.

WASHINGTON EDUCATION ASSOCIATION,

Appellant.

No. 28264-0-II.

June 24, 2003.

BRIDGEWATER, J.

The State sued the Washington Education Association (WEA) alleging that it had violated RCW 42.17.760 by using non-union employees' (nonmembers) agency fees to make political expenditures without their affirmative authorization. Based on U.S. Supreme Court caselaw that (1) mandates a balancing between members' and nonmembers' First Amendment free speech and association rights, and (2) approves of a procedure that requires nonmembers to exercise their rights by objecting or "opting out," we hold that RCW 42.17.760 is unconstitutional because, by requiring an "opt in" procedure, it presumes that

nonmembers object to the use of their fees for political purposes. Accordingly, we reverse.

WEA is a labor organization and the exclusive bargaining representative for some 70,000 Washington public educational employees. As bargaining representative, WEA has a statutory duty to represent every employee in the bargaining unit, members and nonmembers alike.[1] The collective bargaining agreement between WEA and the State includes an agency shop provision that requires all nonmembers to pay service fees; nonmembers are employees who are in the bargaining unit but who choose not to join WEA. Less than five percent of Washington public educational employees choose to be nonmembers.

Forcing nonmembers to contribute money to a labor union amounts to compelled association with the union and impacts[2] their First Amendment free speech and association rights.[3] The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and

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[1] RCW 41.59.090.

[2] *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977) ("To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests.").

[3] *See Roberts v. United States Jaycees*, 468 U.S. 609, 622-23, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

to petition the government for a redress of grievances."[4] Nevertheless, the State's interest in facilitating collective bargaining and preventing free riders justifies the compelled association.[5] Free riders are "employees in the bargaining unit on whose behalf the union [is] obliged to perform its statutory functions, but who refus[e] to contribute to the cost thereof."[6]

Members pay dues to WEA; nonmembers pay agency fees.[7] But under RCW 41.59.060(2) and RCW 41.59.100, agency fees are equivalent to member dues.[8]

A union's expenditures fall into two categories: (1) chargeable expenditures, those related to collective bargaining and representational activities; and (2) non-chargeable expenditures, those unrelated to collective bargaining, including political and ideological expenditures. Because nonmembers pay fees that are equivalent to member dues, they are, in effect, contributing funds for non-chargeable and political expenditures. This also impacts nonmembers' constitutional rights because nonmembers are

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[4] U.S. CONST. amend. I.

[5] *Abood*, 431 U.S. at 220-22, 97 S. Ct. 1782.

[6] *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435, 447, 104 S. Ct. 1883, 80 L. Ed. 2d 428 (1984).

[7] *See* RCW 41.59.060(2); RCW 41.59.100.

[8] *Lee v. Wash. Educ. Ass'n*, 172 F.R.D. 439, 442 (W.D. Wash. 1997).

compelled to make contributions for political purposes.[9]

Under WEA's current practices, nonmembers who object to paying fees for the union's non-chargeable expenditures (objectors) are required to pay only the chargeable portion of the fee, the fair share fee. WEA annually calculates the fair share fee.

Each fall, WEA sends letters to nonmembers notifying them of their right to object to paying fees for non-chargeable expenditures and to challenge WEA's calculation of the fair share fee. The letters include deadlines and detailed financial information regarding WEA's expenditures so that nonmembers can decide whether to object. When nonmembers object, an arbitrator determines the fair share fee. Pending the outcome of the arbitration, WEA escrows any fees that are reasonably in dispute. WEA refunds to objectors the non-chargeable portion of the fee.

Nonmembers who do not object to paying fees for non-chargeable expenditures (non-objectors) do not receive refunds. Instead, their fees are transferred from escrow to WEA's general account and commingled with member dues. WEA makes its non-chargeable expenditures from that account.

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[9] *See Abood*, 431 U.S. at 234, 234 n. 31, 97 S. Ct. 1782.

In August 2000, the Evergreen Freedom Foundation (EFF) filed a complaint with the Public Disclosure Commission (PDC) under RCW 42.17.400(4). EFF alleged that WEA was violating RCW 42.17.760 by using agency fees to make political expenditures without nonmembers' affirmative authorization. RCW 42.17.760 provides:

> A labor organization may not *use* agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless *affirmatively authorized* by the individual.[10]

To avoid another lawsuit with EFF,[11] WEA entered into a stipulation with the PDC acknowledging that it violated RCW 42.17.760 during its 1999-2000 fiscal year. The PDC referred the matter to the Attorney General's Office for prosecution, believing that its administrative penalty was insufficient to address the stipulated violations. A larger penalty is available in superior court.[12]

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[10] RCW 42.17.760 (emphasis added).

[11] *See, e.g., State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 140 Wash. 2d 615, 999 P.2d 602 (2000); *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 111 Wash. App. 586, 49 P.3d 894 (2002).

[12] *See* RCW 42.17.390; RCW 42.17.400(5).

The State sued WEA, alleging that it violated RCW 42.17.760 during the previous five years, 1996 to 2000.[13] Both parties moved for summary judgment.

The superior court granted the State's motion for partial summary judgment, ruling that RCW 42.17.760 requires affirmative authorization from nonmembers before a union may either collect or use agency fees for political expenditures. The court also denied WEA's motion for summary judgment, ruling that RCW 42.17.760 is constitutional, that it did not unconstitutionally amend RCW 41.59.100, and that WEA's fee collection procedures did not satisfy RCW 42.17.760's affirmative authorization requirement. The superior court reserved for trial the issue of whether WEA had "used" agency fees for political expenditures.[14]

At trial, several accountants offered differing opinions on whether WEA had used agency fees to make political expenditures. The parties' jointly retained expert, Michael Gocke, testified that if there were sufficient member dues to pay for all non-chargeable expenses, then agency fees could not have been used to pay for any non-chargeable or political expenditures. Laird S. Vanetta, WEA's expert, opined that WEA had not used agency fees for political expenditures because there were

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[13] The Public Disclosure Act, Chapter 42.17 RCW, has a five-year statute of limitations. RCW 42.17.410.

[14] Clerk's Papers (CP) at 350.

sufficient additional revenues (other than dues or fees) to pay for all of WEA's political expenditures. The State's expert, Jerry Lee Baliban, opined that WEA had used agency fees for political expenditures because once WEA commingled fees with other funds in its general account, every expenditure from that account became tainted with a proportionate share of agency fees.

In July 2001, the superior court issued a letter opinion finding that WEA had violated RCW 42.17.760. The court wrote: "WEA violates RCW 42.17.760 when it collects agency fees and then spends them for prohibited purposes in ratio to the total agency fees and dues collected *without affirmative authorization.*"[15] In its findings of fact, the court explained that "WEA used agency fees, from each [nonmember] who did not receive any refund of part of their fees, for [political] expenditures."[16] The court adopted the "proportionality" theory that the State's expert presented, finding that "when agency fees were commingled with other funds in the general treasury, expenditure of any general treasury monies to influence an election or support a political committee results in use of a proportionate share of agency fees for such purposes."[17] In sum, the trial court found that WEA violated RCW 42.17.760 when it (1) failed to refund the non-chargeable portion of agency fees to non-objectors;

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[15] CP at 361 (footnote omitted).

[16] CP at 371.

[17] CP at 373.

(2) commingled the un-refunded fees with other revenue in its general fund; and (3) later made political expenditures from the general fund.

The superior court assessed a $200,000 penalty against WEA and then doubled the penalty under RCW 42.17.400(5), finding that WEA had intentionally violated RCW 42.17.760.[18] The court based its finding of intent on evidence that WEA knew what the statute required but violated it anyway.[19] For example, WEA had previously acknowledged that the statute "makes all [non-member]s into objectors."[20]

Finally, the superior court entered a permanent injunction and awarded costs and fees to the State. The injunction ordered WEA to implement certain measures and prohibited it from collecting agency fees that are equivalent to member dues.

I. RCW 42.17.760

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[18] Each violation of the Fair Campaign Practices Act, Chapter 42.17 RCW, is punishable by a penalty up to $10,000. RCW 42.17.390(3).

[19] The court found that "WEA was aware of RCW 42.17.760 and that [it] foreclosed the use of agency fees for [political expenditures] without the affirmative authorization of the fee payer." CP at 372.

[20] CP at 208 (WEA's April 1998 reply memorandum supporting motion to dismiss claim brought by EFF); *accord* CP at 86 (April 2000 WEA memorandum in support of summary judgment).

WEA argues that the superior court's interpretation of RCW 42.17.760 is unconstitutional because it impinges on political speech without any sufficiently compelling government interest. We presume that a statute is constitutional, and the party challenging it must prove that it is unconstitutional beyond a reasonable doubt.[21]

A. Agency Fees And The First Amendment

The only authority that a union has to compel nonmembers to pay agency fees is statutory. Statutes that compel nonmembers to pay fees to a union are known as agency shop laws. Nonmembers have challenged these laws numerous times as an infringement on their First Amendment rights. RCW 41.59.060(2) and 41.59.100 compel Washington public educational employees to contribute money to WEA.

The Constitution requires that unions finance their political and ideological expenditures (non-representational activities) with revenues from employees who do not object to advancing those ideas.[22] Thus, nonmembers who object to the

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[21] *Belas v. Kiga*, 135 Wash. 2d 913, 920, 959 P.2d 1037 (1998).

[22] *See Ellis*, 466 U.S. at 448-55, 104 S.Ct. 1883; *Abood*, 431 U.S. at 235-36, 97 S. Ct. 1782; *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Allen*, 373 U.S. 113, 121-22, 83 S. Ct. 1158, 10 L. Ed. 2d 235 (1963); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 770, 81 S.Ct. 1784, 6 L. Ed. 2d 1141 (1961) (a union must not

union's non-representational activities (objectors) have a constitutional right to pay only the chargeable portion of the agency fee, i.e., the fair share fee. In other words, by objecting to the union's non-representational activities, a nonmember asserts his or her First Amendment rights and cannot be compelled to pay more than his or her fair share of the union's chargeable expenditures.

In a 1961 decision, *International Ass'n of Machinists v. Street*,[23] the U.S. Supreme Court addressed whether a union "receiving an employee's money should be free, despite that employee's objection, to spend his money for political causes which he opposes."[24] The Court held that a union could not spend an objecting employee's money in such a manner. Balancing union members' constitutional rights against objectors' rights, the Court stated:

> [T]he majority [union members] also has an interest stating its views without being silenced by the dissenters [objectors]. To attain the *appropriate reconciliation between majority and dissenting interests* in the area of political expression, we think the courts . . . should select remedies which protect both interests to the maximum extent possible

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support its political activities with an objecting employee's mandatory fees.)

[23] *Street*, 367 U.S. 740, 81 S. Ct. 1784.

[24] *Street*, 367 U.S. at 749, 81 S. Ct. 1784.

> *without undue impingement of one on the other.*[25]

Dealing with whether employees had any obligation to voice an objection, the Court stated:

> [D]issent is not to be presumed--it must affirmatively be made known to the union by the dissenting employee. The union receiving money exacted from an employee under a union-shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities.[26]

Thus, the Court enunciated that the First Amendment free speech right was preserved by its exercise. Employees who do not want a union to use their money for political expenditures must make their objection known to the union.

In *Abood*,[27] the Court had to determine whether the states could constitutionally permit "the use of [nonmember]s' fees for purposes other than collective bargaining."[28] The Court held that unions could use non-objectors' fees for such

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[25] *Street*, 367 U.S. at 773, 81 S. Ct. 1784 (emphasis added).

[26] *Street*, 367 U.S. at 774, 81 S. Ct. 1784.

[27] *Abood*, 431 U.S. 209, 97 S. Ct. 1782.

[28] *Abood*, 431 U.S. at 232, 97 S. Ct. 1782.

purposes.[29] Justice Powell, in a concurring opinion joined by Justice Burger (the Chief Justice) and Justice Blackmun, noted that nonmembers must object to prevent the union from using their fees for political expenditures:

> The Court today holds that compelling an employee to finance a union's "ideological activities unrelated to collective bargaining" violates the First Amendment regardless of any asserted governmental justification. But the Court also decides that compelling an employee to finance any union activity that may be "related" in some way to collective bargaining is permissible under the First Amendment because such compulsion is "relevant or appropriate" to asserted governmental interests. *And the Court places the burden of litigation on the individual. In order to vindicate his First Amendment rights in a union shop, the individual employee apparently must declare his opposition to the union* and initiate a proceeding to determine what part of the union's budget has been allocated to

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[29] *See Abood*, 431 U.S. at 235-36, 97 S. Ct. 1782 ("[T]he Constitution requires only that [a union's political] expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.").

> activities that are both "ideological" and "unrelated to collective bargaining."[30]

Thus, in 1977, the Court again reiterated both the balance and the remedy, i.e., expression of objection, in a union or agency shop situation.

In 1986, the Court again dealt with the situation under examination in *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson.*[31] there, the court cited *ABOOD* and twice stAted that nonmembers must object to prevent a union from using their fees for political expenditures.

> In *Abood,* we reiterated that *the nonunion employee has the burden of raising an objection,* but that the union retains the burden of proof.
>
> . . . *The nonunion employee,* whose First Amendment rights are affected by the agency shop itself and who *bears the burden of objecting,* is entitled to have his objections addressed in an expeditious, fair, and objective manner.

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[30] *Abood,* 431 U.S. at 254, 97 S. Ct. 1782 (Powell, J., concurring) (citations omitted; emphasis added).

[31] *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson,* 475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986).

> . . . We reiterate that . . . *the nonunion employee has the burden of objection.*[32]

In sum, nonmembers who do not want the union to use their fees for non-chargeable expenditures must make their objection known to the union.[33] After a nonmember objects, the union must prove that its fair share fee was correctly

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[32] *Hudson*, 475 U.S. at 306, 307, 309, 106 S. Ct. 1066 (emphasis added).

[33] *See Street*, 367 U.S. at 774, 81 S. Ct. 1784 ("Any remedies, however, would properly be granted only to employees who have *made known* to the union officials *that they do not desire* their funds to be used for political causes to which they object. . . . [O]nly those who have identified themselves as opposed to political uses of their funds are entitled to relief.") (emphasis added); *Allen*, 373 U.S. at 119, 83 S. Ct. 1158 ("No respondent who does not in the course of the further proceedings in this case *prove that he objects* to such use [of agency fees by the union for nonrepresentational activities] will be entitled to relief.") (emphasis added); *Abood*, 431 U.S. at 235-36, 97 S. Ct. 1782 ("[T]he Constitution requires only that [nonrepresentational activities] be financed from charges, dues, or assessments paid by *employees who do not object* to advancing those ideas and who are not coerced into doing so against their will by threat of loss of governmental employment.") (emphasis added); *Hudson*, 475 U.S. at 302, 106 S. Ct. 1066 (The objective under the First Amendment " 'must be to devise a way of preventing compulsory subsidization of ideological activity by employees *who object thereto* without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.' " (quoting *Abood*, 431 U.S. at 237, 97 S. Ct. 1782) (emphasis added))).

calculated and does not include non-chargeable expenditures.[34]

B. Constitutionally Required Agency Fee Collection Procedures

Because the payment of fees affects nonmembers' First Amendment rights, the procedures used to collect fees must "be carefully tailored to minimize the infringement" on those rights.[35] Therefore, unions cannot exact fees from nonmembers "without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining."[36] We address this collection procedure only to demonstrate its thoughtful construction by the Supreme Court in connection with the balancing and the remedy that they selected to resolve controversies.

In *Hudson*,[37] the Supreme Court laid out three requirements for the collection of agency fees: unions must (1) provide an "adequate explanation of the basis for the fee" (the *Hudson* notice); (2) give the objector "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker"; and (3) have "an escrow

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[34] *Hudson*, 475 U.S. at 306, 106 S. Ct. 1066.

[35] *Hudson*, 475 U.S. at 303, 106 S. Ct. 1066.

[36] *Abood*, 431 U.S. at 244, 97 S. Ct. 1782 (Stevens, J., concurring).

[37] *Hudson*, 475 U.S. 292, 106 S. Ct. 1066.

for the amounts reasonably in dispute while such challenges are pending."[38] The *Hudson* notice ensures that nonmembers have sufficient information to decide whether to challenge the union's calculation of the fair share fee.[39]

WEA appears to follow *Hudson's* requirements. Agency fees remain in escrow until either: (1) the nonmember does not object to the union's collection of the funds, in which case the funds are released to the union; (2) the nonmember objects and accepts the union's fair share fee calculation, in which case he or she receives a refund in that amount; or (3) the nonmember objects and challenges the union's calculation, in which case an impartial decision maker decides the proper fee and the nonmember receives a refund in that amount.

C. RCW 42.17.760 Creates An "Opt In" Situation

RCW 42.17.760 relieves nonmembers of their burden of objection. Its affirmative authorization requirement creates a presumption that all nonmembers object to the use of their fees for political expenditures. Thus, RCW 42.17.760 is an "opt-in" procedure--nonmembers must give their

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[38] *Hudson*, 475 U.S. at 310, 106 S. Ct. 1066.

[39] *See Hudson*, 475 U.S. at 306, 106 S. Ct. 1066 ("Basic considerations of fairness, as well as concern for the First Amendment rights at stake . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee.").

authorization before the union may use their fees on political expenditures. The statute does not follow the Court's carefully crafted and balanced approach.

Although WEA's fee collection system might satisfy the procedures laid down in *Hudson*, that alone does not satisfy the affirmative authorization requirement in RCW 42.17.760. Indeed, nonmembers who fail to object do not affirmatively authorize the union to use their fees for political expenditures.[40]

D. The Ninth And Sixth Circuits Have Rejected Opt-In Remedies

Two federal circuit courts have rejected opt-in remedies as unduly burdensome on unions. In *Mitchell*,[41] the Ninth Circuit reversed a district court that had imposed an opt-in requirement on a union's agency fee collection system. There, nonmembers argued that the union could collect fees that were equivalent to member dues only if they affirmatively consented to contribute to the union's non-chargeable expenditures.[42] Although the nonmembers had failed to object, the district

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[40] *See Black's Law Dictionary* 59-60 (7th ed. 1999) (defining "affirmative" as: "1. That supports the existence of certain facts < affirmative evidence>. 2. That involves or requires effort <an affirmative duty>.").

[41] *Mitchell v. Los Angeles Unified Sch. Dist.*, 963 F.2d 258 (9th Cir.), *cert. denied*, 506 U.S. 940, 113 S. Ct. 375, 121 L. Ed. 2d 287 (1992).

[42] *Mitchell*, 963 F. 2d at 259.

court enjoined the union from collecting any more than the fair share fee from nonmembers " 'unless the [nonmember] affirmatively consents to deduction of full union dues.' "[43]

The Ninth Circuit rejected the nonmembers' argument and reversed the district court. It relied on a "long line" of Supreme Court cases holding that nonmembers' rights are "adequately protected" when they are given the opportunity to object to paying fees that are equivalent to member dues.[44] The court noted that in *Lehnert v. Ferris Faculty Ass'n*,[45] the Supreme Court's most recent decision in the area of agency fees, the premise remained that employees had the burden of objecting. The Ninth Circuit then proceeded to expressly identify the remedy that they had previously acknowledged:

> There is, accordingly, no support for the [nonmember]s' position in this case that affirmative consent to deduction of full fees is required in order to protect their First Amendment rights. The Supreme Court has repeatedly held that nonunion members' rights are adequately protected when they

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[43] *Mitchell*, 963 F. 2d at 259 (quoting *Mitchell v. Los Angeles Unified Sch. Dist.*, 744 F Supp. 938, 945 (C.D. Cal. 1990)).

[44] *Mitchell*, 963 F.2d at 260, 261, 260-62 (citing *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519, 111 S. Ct. 1950, 114 L. Ed. 2d 572 (1991); *Ellis*, 466 U.S. 435, 104 S. Ct. 1883; *Abood*, 431 U.S. 209, 97 S. Ct. 1782; *Allen*, 373 U.S. 113, 83 S. Ct. 1158; *Street*, 367 U.S. 740, 81 S. Ct. 1784).

[45] *Lehnert*, 500 U.S. 507, 111 S. Ct. 1950.

> are given the opportunity to object to such deductions and to pay a fair share fee to support the union's representation costs. Indeed, this court has expressly articulated the [nonmember]s' burden in *Grunwald v. San Bernardino City Unified Sch. Dist.*, 917 F.2d 1223 (9th Cir.1990). In determining the adequacy of nonunion employees' notice to the union of their objection to the full fee, we said: "The Supreme Court has clearly held that the nonunion employee has the burden of raising an objection. 'The nonmember's "burden" is simply the obligation to make his objection known.' " *Id.* at 1229 (citation omitted) (quoting *Hudson*, 475 U.S. at 306 n. 16, 106 S.Ct. at 1075 n. 16).[46]

The Ninth Circuit then addressed the nonmembers' argument that their right not to pay for non-chargeable expenditures was analogous to a criminal defendant's constitutional rights and thus required their intentional relinquishment of the right. The court rejected the analogy:

> The case before us . . . reveals none of the coercive elements so palpable in a police confrontation. The Supreme Court has never suggested that employees who are offered the opportunity to object to the union fee deduction and do not do so act under any compulsion. There is thus no basis, either factual or legal, for the district court's

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[46] *Mitchell*, 963 F.2d at 261.

> conclusion that plaintiffs were "compelled" to acquiesce, in violation of their First Amendment rights.[47]

Instead, the court found a closer analogy in the "opt-out" procedure for class action lawsuits. An "opt-in" procedure, the court found, "would *unduly impede* the union in order to protect the 'relatively rare species' of employee who is unwilling to respond to the union's notifications but nevertheless has serious disagreements with the union's support of its political and ideological causes."[48]

In *Weaver*,[49] the Sixth Circuit held that nonmembers' silence after sufficient opportunity to object from paying for non-chargeable expenses could indicate acquiescence. The court relied on the line of cases requiring employees to object to the use of their funds for non-chargeable expenditures and the Ninth Circuit's decision in *Mitchell*.[50]

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[47] *Mitchell*, 963 F.2d at 262.

[48] *Mitchell*, 963 F.2d at 263 (emphasis added).

[49] *Weaver v. Univ. of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), *cert. denied*, 507 U.S. 917, 113 S. Ct. 1274, 122 L. Ed. 2d 668 (1993).

[50] *Weaver*, 970 F.2d at 1532 (citing *Hudson*, 475 U.S. 292, 106 S.Ct. 1066; *Abood*, 431 U.S. 209, 97 S. Ct. 1782; *Allen*, 373 U.S. 113, 83 S. Ct. 1158; *Street*, 367 U.S. 740, 81 S. Ct. 1784; *Ry. Employees' Dep't v. Hanson*, 351 U.S. 225, 76 S. Ct. 714, 100 L. Ed. 1112 (1956)).

> [T]he [nonmember]s' argument [that silence cannot be construed as waiver of the right to object from paying for non-chargeable expenditures] must fall because it seeks to *shift the balance of interests* underlying all of the Supreme Court's pronouncements on the subject of agency shop fees. An "opt-in" procedure would *greatly burden* unions while offering only a modicum of control to nonunion employees whose procedural rights have already been safeguarded by *Hudson*.[51]

RCW 42.17.760's affirmative authorization requirement, like the opt-in procedure imposed by the district court in *Mitchell*, would unduly require a union to protect nonmembers who disagree with a union's political expenditures but are unwilling to voice their objections. The procedures imposed on unions by federal law fully protect nonmembers' First Amendment rights. Further restrictions, such as an opt-in procedure, upset the balance between nonmembers' rights and the rights of the union and the majority.[52] *See Abood*, 431 U.S. at 238, 97 S.Ct. 1782 ("[T]hose union members who do wish part of their dues to be used for political purposes have a right to associate to that end 'without being silenced by the

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[51] *Weaver*, 970 F.2d at 1533 (emphasis added).

[52] *See Abood*, 431 U.S. at 238, 97 S. Ct. 1782 ("[T]hose union members who do wish part of their dues to be used for political purposes have a right to associate to that end 'without being silenced by the dissenters.' " (quoting *Street*, 367 U.S. at 772-73, 81 S.Ct. 1784)); *see also supra* note 33.

dissenters.' " (quoting *Street*, 367 U.S. at 772-73, 81 S.Ct. 1784)); *see also supra* note 33.

Furthermore, in *Allen*,[53] the Court acknowledged a union's right to spend nonobjectors' fees on political expenditures: "no decree would be proper which appeared likely to infringe on the *unions' right* to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters' such exactions in support of political activities."[54] The affirmative authorization requirement in RCW 42.17.760 also ignores a union's right to use non-objectors' agency fees on political expenditures.

RCW 42.17.760's affirmative authorization requirement unduly burdens unions. RCW 42.17.760 is unconstitutional in light of the U.S. Supreme Court caselaw and the reasoning articulated by the Ninth Circuit. Because all other decisions of the trial court hinged on the constitutionality of RCW 42.17.760, we do not address them. We reverse the trial court's judgment, including the injunction,[55] attorney fees, and penalties.

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[53] *Allen*, 373 U.S. 113, 83 S. Ct. 1158.

[54] *Allen*, 373 U.S. at 122, 83 S. Ct. 1158 (emphasis added).

[55] The trial court's injunction ignores that RCW 41.59.060(2) grants a union the right to collect fees equivalent to member dues.

II. ATTORNEY FEES

WEA requests its attorney fees and costs at trial and on appeal.[56] WEA has now prevailed. Accordingly, we remand to the trial court with directions to determine (1) whether WEA should receive the costs and attorney fees that it reasonably incurred at the trial level; (2) the amount of the same, if any; and (3) the amount of costs and attorney fees that WEA has reasonably incurred on this appeal.

Reversed.

MORGAN, J., concurs.

HUNT, C.J., (concurring in part, dissenting in part).

I respectfully concur in part and dissent in part. I agree with the majority that under RCW 42.17.760, the union may *collect* agency fees, including those it ultimately intends to use for political purposes. But I disagree with the majority's conclusion that the statute is unconstitutional in prohibiting the political *use* of

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[56] *See* RCW 42.17.400(5) ("If the defendant prevails, he shall be awarded all costs of trial, and may be awarded a reasonable attorney's fee to be fixed by the court to be paid by the state of Washington."); RAP 18.1 (attorney fees are allowed on appeal only if authorized by applicable law); *Ur-Rahman v. Changchun Dev., Ltd.*, 84 Wash. App. 569, 576, 928 P.2d 1149 (1997) (statute authorizing fees to the prevailing party at trial authorizes fees on appeal).

fees collected from nonmembers without their prior affirmative authorization.

I also concur in the majority's reversal of penalties assessed against the WEA. On the record before us, it appears that the WEA was operating under a good faith belief that its actions were lawful so long as it refunded agency fees to nonmembers upon request and used for political purposes only those nonmember fees for which employees had not expressly requested rebates.

I. CONSTITUTIONALITY OF STATUTE

RCW 42.17.760, entitled, "Agency shop fees as contributions," provides:

> A labor organization may not *use* agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, *unless affirmatively authorized* by the individual.

(Emphasis added.) The cases the majority cites do not hold that the Constitution bars a statutory provision, such as RCW 42.17.760, which requires a nonmember employee's affirmative authorization before a union can use his or her agency fee for political purposes.

For example, at pages 248 and 249 of their opinion, the majority cites two Railway Labor Act

cases, *International Ass'n of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), and *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963), for the proposition that an "opt in" provision is not constitutionally required; with this proposition I agree. But these cases do not support the converse, advanced by the majority here, that an "opt in" provision such as Washington's is constitutionally barred.

Similarly, in a First Amendment case also cited by the majority, *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Supreme Court held that a public teachers' union may not use a nonmember's agency fees to underwrite the union's political activity over the nonmember's objection. In so holding, the Court sought to craft a fee-collection procedure that would prevent

> compulsory subsidization of ideological activity by employees who object thereto [1] without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities

and (2) without allowing "union members who do wish part of their dues to be used for political purposes . . . [to be] silenced by the dissenters." *Abood*, 431 U.S. at 237-38, 97 S.Ct. 1782 (citation omitted). In crafting this remedy, the Court sought "guidance" from *Street* and *Allen*, reciting that "dissent is not to be presumed." *Abood*, 431 U.S. at

237-38, 97 S.Ct. 1782. Nonetheless, *Abood* does not expand this clause to hold that that an "opt in" procedure is constitutionally impermissible, as the majority here infers.[57]

Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984), supports this limited reading of *Abood* as stopping short of finding a constitutional requirement that the burden of dissent rests on the objecting employee. The Court noted that *Street, Allen,* and *Abood* "did not, nor did they purport to, pass upon the statutory or constitutional adequacy of the suggested remedies."[58] *Ellis,* 466 U.S. at 443, 104 S.Ct. 1883.

Similarly, in *Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), the Court addressed whether a specific union procedure adequately protected a dissenting employee's right to "prevent the Union[ ]

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[57] Moreover, Justice Stevens left the door open for alternative remedies. *Abood,* 431 U.S. at 244, 97 S. Ct. 1782 (Stevens, J. concurring). Only Justice Powell, as the majority here notes at page 249, reads the majority opinion in *Abood* as placing the burden of dissent on the objecting employee. *Abood,* 431 U.S. at 254-55, 97 S. Ct. 1782 (Powell, J. concurring). In contrast, the majority in *Abood* does not go so far as to hold that the Constitution *requires* the burden of dissent to be placed on the objecting employee.

[58] Although in *Abood,* the Court did mention placement of the burden of dissent in the context of its discussion on remedies, *Abood,* 431 U.S. at 237-38, 97 S. Ct. 1782, in *Ellis,* it neither mentioned nor addressed the burden of dissent.

[from] spending a part of [his] required service fees to contribute to political [activity] . . . unrelated to its duties as exclusive bargaining representative." *Hudson*, 475 U.S. at 302, 106 S.Ct. 1066 (citations and quotations omitted). The Court repeatedly stated that under that specified union procedure, the employee bore the burden of objecting. *Hudson*, 475 U.S. at 306-07, 309, 106 S.Ct. 1066. Again, however, the Court did not hold that the Constitution *mandates* that such burden rest on the employee.[59]

In *Mitchell v. Los Angeles Unified School District*, 963 F.2d 258 (9th Cir.1992), the Ninth Circuit Court of Appeals addressed the constitutional sufficiency of a school district union's "opt out" procedure for nonmember employees. The employees argued that an "opt in" procedure was constitutionally required, to which the Court responded that "the Constitution does not *mandate* a system under which nonmembers pay full union dues only if they 'opt in.'" *Mitchell*, 963 F.2d at 260 (emphasis added). The Ninth Circuit read the Supreme Court opinions mentioned above as holding "that nonunion members' rights are adequately protected when they are given the opportunity to object to such deductions and to pay a fair share fee to support the union's representation costs." *Mitchell*, 963 F.2d at 261. Similar to these Supreme Court opinions, however, in *approving* an "opt out" procedure, the *Mitchell*

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[59] Nor did the *Hudson* Court question the constitutionality of placing such a burden on the dissenting employee.

Court did not hold that the Constitution *requires* an "opt out" procedure in lieu of an "opt in" procedure like the one at issue here.

In short, the cases that the majority cites simply uphold "opt out" procedures as constitutional. None, however, hold that the Constitution *requires* an "opt out" procedure or that the burden of dissent must be on the objecting employee. Further, none of these cases hold that a statutory "opt in" procedure, such as the one in RCW 42.17.760, is constitutionally infirm, contrary to the majority's finding here that an "opt out" procedure is constitutionally mandated.

II. STATUTORY LIMITATIONS

Washington's statutory scheme allows unions to collect fees and dues from union members and equivalent agency fees from non-union members. RCW 41.59.100; RCW 41.59.060(2). Although employees have the right to refrain from joining a union, they may nonetheless be required to pay "a fee to any employee organization under an agency shop agreement." 41.59.060(1). But the union cannot spend such non-members' fees for political purposes without such employees' affirmative authorization. RCW 42.17.760. Rather, non-authorizing nonmembers are entitled to rebates of that portion of their agency fees that would have gone for union political expenses. RCW 42.17.760.

Here, the parties' jointly retained expert, Michael Gocke, testified that member dues alone were sufficient to cover all WEA political expenses. But the practical effect of such a scheme would be to shift a disproportionate share of the collective bargaining expenses onto nonmembers' agency fees: In essence, the non-members would pay a portion of the members' share of the collective bargaining expenses, thus freeing up a larger share of the members' dues for political expenses. Such a scheme appears to contradict the Legislature's goals of (1) equal allocation of collective bargaining expenses between members and non-members, (2) equal allocation of political expenses between members and affirmatively assenting non-members, and (3) retention of the political expense portion of agency fees to non-assenting non-members. *See* RCW 41.59.060(1); RCW 41.59.100; RCW 42.17.760.

Even taking the evidence here in the light most favorable by the WEA, the record supports the trial court's findings that

> WEA violates RCW 42.17.760 when it collects agency fees and then spends them for prohibited purposes in ratio to the total agency fees and dues collected *without affirmative authorization.*

Clerk's Papers (CP) at 361.

> WEA used agency fees, from each [nonmember] who did not receive any refund

> of part of their fees, for [political] expenditures.

CP at 371.

Accordingly, I would affirm the trial court's conclusion of law that

> [w]hen agency fees were commingled with other funds in the general treasury, expenditure of any general treasury monies to influence an election or support a political committee results in use of a proportionate share of agency fees for such purposes.

CP at 373. I would also uphold the trial court's injunction prohibiting the WEA from collecting agency fees, equivalent to member dues, from nonmembers who do not first affirmatively authorize a portion for political expenditures as the Legislature has prescribed in RCW 42.17.760.

III. PENALTIES

I would affirm the trial court's finding that the WEA contravened the plain, and constitutional, language of RCW 42.17.760 when (1) it knowingly collected nonmember fees, in part for political expenditures, without those nonmembers' prior affirmative authorization; and (2) refunded such fees only when a nonmember specifically requested a rebate. Therefore, I dissent from the majority's contrary holding on this point.

But I concur in the majority's reversal of the penalties assessed against the WEA. The record shows that the WEA had a good faith basis for relying on its interpretation of the statute and for requiring nonmembers to request rebates following collection of agency fees. Clearly, the WEA read and interpreted the Supreme Court cases in a manner consistent with my learned colleagues' reading as rendering the "opt in" collection method unconstitutional. In spite of my dissention from the majority's legal conclusion as to the constitutionality of the statute, I do not find the penalties against WEA warranted and, therefore, I concur in the majority's reversal of the penalties assessed below.

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*IN THE COURT OF APPEALS OF THE
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DIVISION II

STATE OF WASHINGTON ex rel. WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, Respondent, v. WASHINGTON EDUCATION ASSOCIATION, Appellant.	No. 28264-0-II ORDER GRANTING STAY OF INJUNCTION

On June 24, 2003, this court held unconstitutional Washington's "opt in" procedure under RCW 42.17.760, which prohibited a labor organization's use of an individual's agency shop fees for political purposes unless the individual "affirmatively authorized" such use. RCW 42.17.760. Thereafter, the appellant, Washington Education Association (WEA), moved to stay an injunction that the trial court issued on December 3, 2001. That injunction required the WEA to implement various measures to insure

*All errors in original documents have been retained.

compliance with RCW 42.17.760. As we have held that RCW 41.17.760 is unconstitutional, it is hereby

ORDERED that the trial court's December 3, 2001 injunction is stayed until further proceedings inconsistent with our aforementioned decision dated June 24, 2003.

DATED: 7/24/03

//s//
Bridgewater, J.

I concur:

//s//
Morgan, J.

I respectfully dissent:

//s//
Hunt, C.J.

FILED
DEC -3 2001
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

The Honorable Gary R. Tabor

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

State Of Washington ex rel. Public Disclosure Commission, Plaintiff, v. Washington Education Association, Defendant.	No. 00-2-01837-9 JUDGMENT

Judgment Summary (RCW 4.64.030):

Judgment Creditor:	State of Washington
Judgment Creditor's Attorney:	D. Thomas Wendel, Assistant Attorney General
Judgment Debtor:	Washington Education Association
Judgment Amount:	$400,000.00
Taxable Costs and Attorneys' Fees:	To Be Set by Further Order of the Court
Pre-Judgment Interest:	None
Post-Judgment Interest:	Statutory (12 percent)

The above cause having come on regularly for trail on the 14th day of May, 2001, before the court sitting without a jury, plaintiff having been represented by Christine O. Gregoire, Attorney General, D. Thomas Wendel, Assistant Attorney General, and Richard Heath, Special Assistant Attorney General, and defendant having been represented by Judith Lonnquist and Harriet Strasberg; and evidence both oral and documentary having been introduced, the case argued, and Findings and Conclusions from trial having been entered, and this Court having ruled on the parties motions for summary judgment by Order dated May 4, 2001, and entered a Permanent Injunction, and the court being fully advised, now, therefore, it is hereby

ORDERED ADJUDGED AND DECREED, that the plaintiff, State of Washington ex rel. Public Disclosure Commission, shall have and recover JUDGMENT against defendant Washington Education Association, in the amount of Four Hundred Thousand Dollars ($400,000.00), and, in addition, plaintiff is hereby awarded its costs of investigation and trial of this matter, including reasonable attorney fees, in an amount to be set by further Order of this Court, and it is hereby

FURTHER ORDERED that this Court shall retain jurisdiction over the Injunction entered in this matter, for limited purposes of enforcement, and the Court hereby Finds and Determines that there is no just reason for delay and that this is a final Order of the Court disposing of all issues in this case and finally determines the action herein.

DONE IN OPEN COURT this *3* day of *Dec*, 2001.

//s//
JUDGE GARY R. TABOR

Presented by:

CHRISTINE O GREGOIRE
Attorney General

//s//
D. THOMAS WENDEL, WSBA #15445
Assistant Attorney General
Attorneys for Plaintiff

Approved as to form:

//s//
Harriet Strasberg, WSBA #15890
Attorney for Defendant

FILED
DEC -3 2001
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

The Honorable Gary R. Tabor

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

State Of Washington ex rel. Public Disclosure Commission, Plaintiff, v. Washington Education Association, Defendant.	No. 00-2-01837-9 PERMANENT INJUNCTION

The above cause having come on regularly for trial on the 14th day of May, 2001, before the court sitting without a jury, plaintiff having been represented by Christine O. Gregoire, Attorney General, D. Thomas Wendel, Assistant Attorney General, and Richard Heath, Special Assistant Attorney General, and defendant having been represented by Judith Lonnquist, Harriet Strasberg, Michael J. Gawley, and Aimee Iverson, and evidence both oral and documentary having been introduced, the case argued, and the Court having entered a letter Opinion on July 30, 2001 concluding that defendant violated RCW 42.17.760

and that an injunction should be entered, and the Court having considered further arguments and pleadings of the parties, now, therefore,

IT IS HEREBY ORDERED that defendant Washington Education Association shall implement the following measures to comply with RCW 42.17.760 immediately and within 30 days of the date of this Order complete the following activities, unless a different date or time period is otherwise specified for a specific activity in the terms of this Order below:

1. For each fiscal year from the present, WEA shall identify, record, and quantify all expenditures and contributions to influence an election or operate a political committee (§ 760 expenses), which shall include all political advertising expenditures, as well as direct and in-kind contributions, internal political communications, and independent expenditures. § 760 expenses do not include expenditures made by WEA from its Community Outreach Program, which does not utilize agency shop fees. Activities to accomplish this shall include the following:

a) Revise Weekly Activity Reports (WAR Reports) to include the Category Description items enumerated 91 and 93, as shown on Exhibit 1 hereto, in the activities reported on WAR Reports, and instruct and require employees who keep WAR reports to report time on activities encompassed in Categories 91 and 93 and provide supervisory review of WAR reports within a reasonable time following their completion;

b) For those employees who do not keep WAR Reports and who engage in activities that meet the description of § 760 expenses, WEA shall instruct and require those employees to keep Political Activity Reports (PAR Reports) and to report time on such activities in their PAR Reports, whether or not those activities are reportable to the PDC.

c) Record for each advertising expense for political purposes or to influence an election, a general description of the content, the identity of the candidate or ballot proposition to which the advertising relates, if any, and take such other measures as are necessary to identify and quantify political advertising expenses;

d) Record expenses and salaries associated with internal communications to enable identification and quantification of all expenses of any internal communications to support or opposes ballot propositions or candidates or otherwise are made to operate a political committee or influence an election;

e) Record all direct and in-kind contributions to political committees or to influence elections;

f) For each WEA fiscal year, generate a written analysis of WEA's § 760 expenses, which produces both the total dollars that were used for these purposes and the percentage of WEA's total expenditures that were used for these purposes;

g) Obtain a certification of an independent audit that satisfies generally accepted accounting and auditing standards of each fiscal year's analysis of all of WEA's § 760 expenses;

2. WEA shall return to all agency fee payers who have not affirmatively authorized (as defined by the Court's ruling on Plaintiff's Motion for Summary Judgment) the use of their fees for expenditures or contributions to influence an election or operate a political committee a percentage of the annual fees charged to the fee payer, in the following manner:

a) For WEA fiscal years 2001 – 2002, and 2002 – 2003, issue a refund or rebate in an amount equal to eight percent (8 %) of the agency fee charged annually by WEA to the fee payer for each fiscal year, and until the refunds or rebates are made, maintain in a segregated account an amount equivalent to eight percent (8 %) of all agency fees received by the WEA; however, no refunds or rebates need be given to fee payers who are objectors or challengers under WEA's Hudson process and receive a refund of the non-chargeable portion of their fees inclusive of the portion related to WEA's political expenditures;

b) For WEA fiscal year 2001 – 2002, the refund or rebate to agency fee payers shall be mailed on or before January 15, 2002. Another mailing of rebates will be mailed on or before April 15, 2002 to capture any fee

payers employed during the 2001 – 2002 fiscal year, but who were unknown to WEA before December 31, 2002;

c) For WEA fiscal year 2002 – 2003, the refund or rebate to agency fee payers shall be mailed to all known agency fee payers by November 15, 2002. Another mailing of rebates will be mailed on or before April 15, 2003 to capture any fee payers employed during the 2002 – 2003 fiscal year but who were unknown to WEA on November 15, 2002.

d) For fiscal years 2001 – 2002 and 2002 – 2003, any refunds or rebates that cannot be conveyed to agency fee payers because the rebates or refunds are returned to WEA undelivered, or which WEA cannot mail, or for any other reason, shall be retained until the end of the subject fiscal year by WEA in a segregated account, and if they remain unclaimed and undeliverable by August 31 of that fiscal year, the unclaimed or undeliverable funds so retained shall be distributed to the WEA Children's Fund, to the American Red Cross, or to Northwest Harvest.

e) For WEA fiscal year 2003 – 2004, and every fiscal year thereafter, WEA shall reduce the agency fees chargeable to agency fee payers from an amount equivalent to 100 percent of the member dues by

(i) the percentage of the WEA's total expenditures that are analyzed to have

been used for § 760 expenses in the second fiscal year prior, e.g. reductions in 2003 – 2004 shall be based upon WEA's analysis of 2001 – 2002 expenditures,

(ii) plus a cushion of 3 percent of the annual agency fee for the respective fiscal year, in order to take into account the annual variations that may occur in WEA's § 760 expenses, the short term agency fee payer who may not be employed long enough to benefit from averaging of long term variations, and negligible errors in either calculations or organization expenses.

f) Separate refunds or rebates will not be issued to fee payers who object or challenge and receive a rebate equal to the non-chargeable percentage of WEA expenditures, pursuant to federal case law and the *Leer* settlement agreement, as the § 760 expenses are already included in the overall non-chargeable percentage of agency fees rebated to fee payers who object or challenge.

3. WEA may release and deposit into its general fund 70 per cent of agency fees paid to and for WEA during fiscal year 2000 – 2001 and which have been held in escrow; the remaining 30 per cent shall be retained in escrow until a final resolution is reached in the matter of Davenport v. WEA, Thurston County Superior Court Cause No. 01-2-00519-4. If damages must be paid to plaintiffs by WEA in Davenport, then the escrowed amount may be used for those damages. If defendant is not liable to plaintiffs in Davenport for

agency fees collected in WEA fiscal year 2000 – 2001, then this matter may be brought on by the parties for further consideration by this Court before the remaining escrowed funds are released by WEA.

IT IS HERBY FURTHER ORDERED that:

A. This Injunction shall take effect immediately and remain in effect permanently, except that, in the event the Washington State Public Disclosure Commission promulgates and puts into effect administrative rules that impose measures in conflict with this Injunction, or any valid initiative or legislation is passed, then any provision of this Injunction that is in conflict with the administrative rules and/or statutes shall be void, but the provisions of this Injunction not in conflict shall remain in full force and effect.

B. Nothing herein shall be construed to waive or foreclose any challenge that might otherwise be made to rulings and findings made by this Court at any stage in these proceedings, and any provisions of this Injunction dependent upon such rulings and findings.

C. Compliance with this injunction and any statutes or PDC rules that may be promulgated that affect this injunction pursuant to Paragraph A, above, shall constitute compliance with RCW 42.17.760.

D. This Court shall retain jurisdiction of this matter for enforcement of this Injunction, and, in the event an action is brought to assert a violation of this Injunction, the prevailing party shall be

entitled to reasonable attorney fees and costs for the challenge.

DONE IN OPEN COURT this *3rd* day of *Dec*, 2001.

//s//
JUDGE GARY R. TABOR

Presented, without waiver of objections, by:

CHRISTINE O GREGOIRE
Attorney General

//s//
D. THOMAS WENDEL, WSBA #15445
Assistant Attorney General
Attorneys for Plaintiff

APPROVED AS TO FORM; NOTICE OF PRESENTATION WAIVED:

//s//
Harriet Strasberg, WSBA #15890
Attorneys for Defendant

FILED
DEC -3 2001
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

The Honorable Gary R. Tabor
Hearing date: November 15, 2001

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

State of Washington ex rel. Public Disclosure Commission, Plaintiff, v. Washington Education Association, Defendant.	No. 00-2-01837-9 FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS COURT having conducted a trial of the above-captioned matter between May 14, 2001 and May 18, 2001, Plaintiff represented by its attorneys Christine O. Gregoire, Attorney General, D. Thomas Wendel, Assistant Attorney General, and Richard Heath, Special Assistant Attorney General, and Defendant represented by its attorneys, Judith Lonnquist, Harriet Strasberg, Michael Gawley and Aimee Iverson, and the Court having received documentary and testimonial evidence, and having considered the arguments and authorities submitted by counsel for the parties,

and having made certain rulings of law in an Order Regarding Cross Motions for Summary Judgment, entered on or about May 10, 2001, and having issued its Letter Opinion on or about July 31, 2001, both of which are incorporated herein by this reference, now, therefore, the Court hereby enters the following findings of fact and conclusions of law from the trial of this matter:

FINDINGS OF FACT

1. The Public Disclosure Commission, represented herein *ex rel.* by the State of Washington, is an agency of the State of Washington.

2. Defendant Washington Education Association (WEA) is a labor organization that represents public school employees in the State of Washington.

3. WEA manages its finances in fiscal years that begin on September 1 and end on August 31, and fiscal years are referred to by reference to the second calendar year in a fiscal year (e.g. the fiscal year from September 1, 1995 to August 31, 1996 is referred-to as fiscal year 1996).

4. WEA, through the collective bargaining process, has negotiated contracts with various school districts requiring collection of fees from non-members of the WEA who work in bargaining units covered by the such contracts ("agency fee payers"), which are referred to as "agency fees". Agency fee payers pay fees equal to the dues paid by the WEA members,

except that fee payers do not pay Community Outreach ("COP") assessments. COP funds were not part of this lawsuit.

5. Fee payers who object to the amount of agency fees receive a refund based upon the ratio of "chargeable" to "nonchargeable" expenses – part of the so-called "Hudson" process (***Chicago Teachers Union v. Hudson***, 574 U.S. 292, 106 S. Ct. 2641 (1988)). "Chargeable" fees are those expenditures that are germane to collective bargaining. Expenditures to influence an election or to operate a political committee are included in "nonchargeable" expenditures.

6. Only WEA members have voting rights within the WEA; as nonmembers, fee payers have neither voting rights, nor any right to determine the amount or use of the agency fees that they are required to pay to the WEA.

7. For each WEA fiscal year from 1996 to 2000, WEA received agency fees from between 3000 and 4000 agency fee payers.

8. For each WEA fiscal year from 1996 to 2000, the annual agency fees collected from fee payers for WEA were the same amount as the annual dues collected from comparably situated members.

9. For each WEA fiscal year from 1996 to 2000, WEA received no affirmative authorization from any agency fee payer for the use of their agency fees for contributions or expenditures to influence an election or operate a political

committee; since 2001, WEA has held all agency fees in escrow without making expenditures therefrom.

10. The fees received from agency fee payers are quite small in amount and as a percentage of WEA's total revenue.

11. The amounts expended by WEA to influence an election or to operate a political committee are a small percentage of its overall expenditures.

12. In each WEA fiscal year from 1996 to 2000, WEA had sufficient reserves to more than offset the fee payer amounts in question.

13. For each WEA fiscal year from 1996 to 2000, WEA commingled agency fees in its general operating fund with member dues and other moneys.

14. Even if agency fees had been segregated, any surplus at the end of the fiscal year would have reverted to the general fund.

15. For each WEA fiscal years from 1996 to 2000, WEA did not separately account for the use of agency fees that were commingled in its general operating fund with member dues and other moneys.

16. For each WEA fiscal year from 1996 to 2000, moneys were used from the WEA general operating fund for expenditures or contributions to influence an election or operate a political committee, such as direct and in-kind contributions to political

committees, and communications to support or oppose other political positions.

17. For each WEA fiscal year from 1996 to 2000, WEA made expenditures from the WEA general fund for expenditures or contributions to influence an election or operate a political committee.

18. Any distinction between collecting an agency fee on the revenue side, and expending monies for a particular purpose on the expense side, is forever obscured when the funds collected are commingled into a general fund.

19. Under the circumstances of this case, where fee payers must pay the same amount annually as members pay in dues, and the agency fees are commingled with dues in the general fund, it is unfair to use the fees, in whole or in part, in proportions and purposes different from the use of dues.

20. For each WEA fiscal year from 1996 to 2000, WEA used agency fees, from each agency fee payer who did not receive any refund of part of their fees, for expenditures or contributions to influence an election or operate a political committee.

21. A total of approximately 8,000 fee-payers for the WEA fiscal years from 1996 to 2000, is a faire and reasonable estimate of the number of fee-payers. A penalty of $25 for each of said fee payers is reasonable, and results in a penalty of $200,000. In any event, for each WEA fiscal year from 1996 to 2000, WEA used

agency fees at least four times to make expenditures or contributions to influence an election or operate a political committee, which results in the same penalty amount: $200,000.

22. For each WEA fiscal years from 1996 to 2000, WEA intentionally made multiple expenditures from the WEA general operating fund for expenditures or contributions to influence an election or operate a political committee.

23. For each WEA fiscal year from 1996 to 2000, WEA was aware of RCW 42.17.760 and that the statute foreclosed the use of agency fees for contributions or expenditures to influence an election or operate a political committee, without the affirmative authorization of the fee payer.

24. After executing a Stipulation of Violations with the Plaintiff, WEA chose not to attempt to mitigate or negotiate the outcome of the dispute. WEA clearly understood the PDC position leading to this trial and did not immediately agree.

25. For each WEA fiscal year from 1996 to 2000, WEA could not reasonably have believed that its use of agency fees complied with the requirements of RCW 42.17.760.

26. WEA stipulated and admitted, in September, 2000, that it had committed multiple violations of RCW 42.17.760 during its fiscal year 2000.

27. A reasonable fine for multiple violations of RCW 42.17.760, for the WEA fiscal years 1996 – 2000, is two hundred thousand dollars ($200,000.00).

28. For each WEA fiscal year from 1996 to 2000, WEA's use of agency fees for contributions and/or expenditures to influence elections and/or operate political committees, without affirmative authorization from any fee payers, was intentional.

29. WEA intentionally chose not to comply with RCW 42.17.760.

30. The intentional violations of RCW 42.17.760 justify a doubling of the fine to four hundred thousand dollars ($400,000.00).

31. Irreparable harm will result if WEA continues to use agency fees without affirmative authorization from individual fee payers for expenditures or contributions to influence an election or operate a political committee.

32. This Court did not have sufficient understanding of the parties' positions to fashion its own remedy to assure compliance with the statute at the time of the Letter Opinion; however, the parties are well suited to such task. The Court will consider suggested solutions proposed by the parties.

33. The State of Washington should be awarded its reasonable costs and attorney fees for prosecution of this action; however, the costs and fees should not be doubled or trebled due to the intentional conduct of WEA.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter and the parties to this action.

2. RCW 42.17.760 prohibits a labor organization from using agency fees paid by an agency fee payer for expenditures or contributions to influence an election or operate a political committee, unless it first obtains affirmative authorization to do so from the individual fee payer.

3. The plaintiff State of Washington, *ex rel.* Public Disclosure Commission, is authorized to bring actions to enforce the provisions of RCW Chapter 42.17, including RCW 42.17.760. RCW 42.17.390, and RCW 42.17.400.

4. The WEA is a labor organization as that term is used in RCW 42.17.760.

5. Under the circumstances presented by this case, when agency fees were commingled with other funds in the general treasury, expenditure of any general treasury monies to influence an election or support a political committee results in use of a proportionate share of agency fees for such purposes.

6. The use of an individual fee payer's agency fees to influence an election or operate a political committee, without the affirmative authorization of the individual, is a violation of RCW 42.17.760.

7. An expenditure or contribution that is made to influence an election or operate a political

committee, using agency shop fees without the affirmative authorization of the individual fee payer, is a violation of RCW 42.17.760.

8. For each WEA fiscal year from 1996 to 2000, WEA committed multiple violations of RCW 42.17.760.

9. RCW 42.17.390(3) authorizes this Court to impose fines in the amount of up to ten thousand dollars ($10,000.00) for each violation of any provision of RCW Chapter 42.17, including RCW 42.17.760.

10. This Court is authorized to impose a fine against WEA under the Findings above, in the amount of two hundred thousand dollars ($200,000.00) for violations of RCW 42.17.760.

11. RCW 42.17.400(5) authorizes this Court to impose up to treble the amount of the judgment, if the violations have been found to be intentional, and the fine imposed upon WEA is hereby doubled to four hundred thousand dollars ($400,000.00).

12. RCW 42.17.400(5) authorizes this Court to award to the State all costs of investigation and trial, and this Court hereby Orders the WEA to pay to the State all reasonable costs of investigation and trial in an amount to be proven by the State at a later time.

13. RCW 42.17.390(6) authorizes this Court to enjoin any person to prevent the doing of any act prohibited in RCW Chapter 42.17, or to compel the performance of any such act, and the Court hereby Orders WEA to undertake

measures to comply with RCW 42.17.760 as will be specified by further Order of this Court.

DONE IN OPEN COURT this *3* day of *Dec*, 2001.

//s//
JUDGE GARY R. TABOR

Presented, without waiver of objections, by:

CHRISTINE O GREGOIRE
Attorney General

//s//
D. THOMAS WENDEL, WSBA #15445
Assistant Attorney General
Attorneys for Plaintiff

APPROVED AS TO FORM; NOTICE OF PRESENTATION WAIVED:

//s//
Harriet Strasberg, WSBA #15890
Attorneys for Defendant

THURSTON COUNTY
SUPERIOR COURT LETTERHEAD

July 31, 2001

David T. Wendel, AAG
P.O. Box 40126
Olympia, WA 98504-0126

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Letter Opinion

RE: *State Public Disclosure Commission vs. Washington Education Association*

Thurston County Cause #00-2-01837-9

Dear Counsel:

On May 14-18th, this court presided over a trial in the above-entitled case and took the matter under advisement following closing arguments by the parties. Now, having considered the testimony presented at trial, the briefs and arguments of the parties and the applicable statutes and case authority, this court rules by way of this letter opinion.

BACKGROUND

The trial in this matter focused upon facts surrounding the collection of fees by the Washington Education Association (WEA) from non-union members called "fee payers" for a five year period (1995/1996 through 1999/2000). These "fee payers" pay fees equal to the Union Dues paid by union members[1] unless they raise an objection. Those who object receive a refund based upon a formula that accounts for the ratio of "chargeable" to "nonchargeable" expenses.[2] The Public Disclosure Commission (PDC), plaintiff in this matter, claimed that portions of these fees were used for 'political purposes" in violation of

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[1] These fees do not include the amount union members pay as "Community Outreach Project" (COP) assessments. COP funds were not a part of this lawsuit.

[2] This process is called the **Hudson** process, *see* ***Chicago Teachers Union v. Hudson***, 475 U.S. 292, 106 S. Ct. 2641 (19898) and distinguishes expenses that are "chargeable" to collective bargaining purposes from those which are not.

RCW 42.17.760[3], that civil penalties[4] and costs should be imposed by this court, and that this court should consider whether any violations that might be found were "intentional" which would allow the court to "treble" any penalties and costs.[5]

The parties had previously agreed that the WEA had committed multiple violations of RCW 42.17.760.[6] The agreement itself did not, however, specify what time period it covered. This court ruled, on March 23rd, 2001, at a pre-trial hearing, that the agreement time period would be the 1999-2000 school year and that alleged violations for the previous four years would be considered at trial. This court also ruled on summary judgment that RCW 42.17.760 is constitutional and requires an affirmative authorization from agency fee payers (as opposed to a passive failure to object) before the WEA may collect or use such fees for "political purposes".[7]

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[3] RCW 41.27.760 **Agency shop fees as contributions.** A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

[4] RCW 42.17.390(3)

[5] RCW 42.17.400(5)

[6] Trial Exhibit 1, dated September 25, 2000.

[7] This court ruled orally on May 4, 2001 and the written order was entered May 15, 2001.

ISSUES

The court will rule on the following issues as a result of the evidence produced at trial and the positions of the parties:

1. Did the WEA use agency fees in fiscal (school) years 1995-96, 1996-97, 1997-98, and 1998-1999 for purposes forbidden in RCW 42.17.760?[8]

2. What is the appropriate amount of civil penalty to be imposed according to RCW 42.17.390(3)?

3. Were WEA's violations "intentional" and if so should penalties and costs be increased up to a treble amount as punitive damages under RCW 42.17.400(5)?

4. What other relief, if any should this court impose?

FINDINGS

I. THE WEA HAS USED AGENCY FEES IN VIOLATION OF RCW 46.17.760

The evidence produced at trial has convinced this court that the WEA did, in fact, use portions of the agency shop fees they received for "political purposes" that is, " . . . to make contributions or expenditures to influence an election or to operate a political committee, . . . " as prohibited by RCW 42.17.760. While this court understands the position of the WEA to the effect that they had sufficient reserves each year to more than offset the

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[8] Violations for 1999-2000 have been admitted by the WEA.

fee payor amounts in question, and that amounts involved are quire small percentage wise (both the amounts received from agency fee payers and amounts expended for political purposes), this court disagrees with that logic. Any distinction between "collecting" and agency fee (on the revenue side) and "expending" monies for a particular purpose (on the expense side) are forever obscured when the funds collected are "commingled" into the general fund.

It is clear to this court that the WEA position was that agency fees were placed into the general fund and were spent each year as the WEA determined appropriate.[9] Moreover, the WEA has further argued that even if the agency fees could have been separated, they would come back into the general fund at the end of the year as "surplus" funds. This reasoning is erroneous. This court could cite numerous examples of the unfairness of such a position, but in the interest of time and space will note only two:

First, the logical extension of such reasoning is that the WEA would, as a result of such fees, have more money to spend than if they had not collected them. If those funds could be construed to be spent only for non-political purposes, the WEA would still, obviously, have more monies to spend from other funds for political purposes. This is a clear-cut use of the total funds available for the

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[9] That is, unless a agency fee-payer affirmatively objected to the use of his or her funds for purposes other than collective bargaining. It that case a portion of the fees would be returned to the fee-payer under the Hudson process.

given purposes in proportion to the source of the funds. While the percentage might be small, the agency fees are nevertheless used as a part of the over-all total expenditures, some of which were for prohibited purposes.

Second, if agency fee amounts are simply held, and not spent (part of the unexpended funds which existed each year) by the end of the fiscal year, WEA's position that they then lose their character and are simple a part of the surplus that can be carried over, would obviously prompt a practice of just waiting a year and spending the money without restrictions. This flies in the face of the underlying problem that this court has previously identified – that of collecting fees from agency fee payers without first gaining their affirmative authorization to do so. There would be no incentive to do so if the court were only to consider what was spent in the year it was collected.

In short, the WEA violates RCW 42.17.760 when it collects agency fees and then spends them for prohibited purposes in ratio to the total agency fees and dues collected[10] *without affirmative authorization.* While the amount spent for "political purposes" will be a component of the formula for assessing what portion of the agency fees are to be credited or returned to the agency fee payers, that amount need not be quantified for this court to rule as its initial finding that such fees are, indeed, being spent in violation of the statute. The

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[10] Again, COP assessments or dues are not included.

issue of how the amount of political expenditures can be factored into a determination of the correct proportional adjustment to agency fees is best left to the "Other Court Remedies" discussion below.

II. THIS COURT ASSESSES A CIVIL PENALTY OF $200,000 AGAINST THE WEA.

Having found that the WEA violated the law as set forth in RCW 42.17.760 by using agency fees for political purposes without affirmative authorization as set forth above, the court must next address appropriate civil penalties, if any, under RCW 42.17.390(3).[11] A fine of up to $10,000 for each violation of the statute presents a broad number of options to this court. This court holds, first of all, that a civil penalty is appropriate in the present case aside from any amount of restitution or refund owed. While the WEA, during the 5 year period at issue, has collected and has had the benefit of monies it was not entitled to under the statute, this court is not addressing what, if any monies or damages any individual or group of fee payers would be entitled to.[12] Instead, this court notes that a penalty amount is appropriate to

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[11] (3) Any person who violates any of the provisions of this chapter may be subject to a civil penalty of not more than ten thousand dollars for each such violation.

[12] The court notes that this action was filed by the Office of the Attorney General of the State of Washington under RCW 42.17.400(1) and is on behalf of the State of Washington as distinguished from individual agency fee payers. No fee payer sought to intervene in this matter although several individuals did ask for permission to submit amicus pleadings, which this court denied.

preserve the integrity of our system and promote public confidence: those violating statutes will be held to answer.

This court accepts, in principle, the arguments submitted by the Plaintiff herein. First of all, there cannot be an absolute determination of the amounts involved[13] either those lost to fee payers or gained by the WEA (costs avoided by not complying with the affirmative authorization requirement). Secondly, the total number or even the identity of individuals involved cannot be determined since there were constant changes over the five-year period; nevertheless a penalty could be assessed as to each individual found to have been an agency fee payer if the court desired. Plaintiff proposed that the court consider a total of 8,000 individuals, (although the actual figure appears to be almost double that[14]), and that a penalty of $25 be assessed for each of those individuals for a total of $200,000. This court accepts that proposal as being fair to both sides under the present facts.[15]

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[13] *See State v. WWJ Corp.* 138 Wn.2d 595, 980 P.2d 1257 (1999).

[14] Exhibit 1 acknowledges that there were 4,194 agency fee payers in 1999/2000. The WEA argues that this number was over inclusive, so that Plaintiff has reduced that number to 3,200 per year; a total of 16,000 over five years. Plaintiff then cuts that figure in half (8,000) and asks for a penalty of $25 for each. That results in the requested $200,000 figure.

[15] Even if the court were to accept Ms. Lonnquist's argument that the WEA stipulated to only 4 violations for the fiscal year 1999 (4 times each year that moneys were not

III. THIS COURT FINDS AN INTENTIONAL VIOLATION BY THE WEA IN FAILING TO FOLLOW THE LAW AND DOUBLES THE AMOUNT OF DAMAGES AS A PUNITIVE SANCTION. THE COURT CHOOSES NOT TO DOUBLE COSTS.

This issue has been the most difficult trial issue for this court. I have listened carefully to the testimony of the witnesses and concede that there was ambivalence and a lack of official direction as to the correct interpretation of the "affirmative authorization" language by leaders for both the WEA and the PDC. On the other hand, it is clear to this court that much of that indecision on the part of the WEA was a desire to not have to get involved in a laborious process to secure such affirmative authorizations if they didn't have to. Despite a clear communication from the Washington State Labor Council in 1997,[16] the WEA chose to take the easy road. This court will also observe that even when it became completely apparent that this obvious requirement had been ignored and the WEA stipulated to "multiple violations" in September of 2000[17] the WEA could still not bring itself to acknowledge the obvious state of affairs and attempt to mitigate and negotiate the outcome of this dispute.

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segregated), 4 violations in each of 5 years would constitute 20 violations; if assessed at $10,000 each that would still total $200,000.

[16] Exhibit 94 at trial.

[17] Exhibit 1

The PDC clearly did not move decisively to enforce this statute either; that is unfortunate. The PDC acted only when spurred to do so by citizen complaints. Any excuses that the PDC doesn't have to make regulations to explain statute compliance procedures serve no real purpose at this trial other than to further polarize the parties. The parties here are going to be required to work together in the future to accomplish what needs to be done in this case; this court would hope that previous communication problems will not be repeated. The fact remains however, a violation of statute is still a violation; for example a person who is speeding down a roadway does not have the right to speed just because a police officer does not make a traffic stop when the opportunity arises. The WEA argument that if the PDC had told them what was expected, they would have immediately complied, is not compelling to this court. The WEA clearly understood the PDC position leading to this trial and certainly did not immediately agree.

RCW 42.17.400(5) gives this court the discretion to treble the amount of judgment as punitive damages.[18] For the reasons discussed above, I find that the WEA "intentionally" chose not to comply with the clear language of the statute; this court imposes a punitive sanction of $400,000 (double the $200,000 civil penalty

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[18] (5) In any action brought under this section, the court may award to the state all costs of investigation and trial, including a reasonable attorney's fee to be fixed by the court. If the violation is found to have been intentional, the amount of the judgment, which shall for this purpose include the costs, may be trebled as punitive damages. . . .

assessed above). The court will also award the Plaintiff an appropriate amount of costs of investigation and trial, including attorney's fees (to be determined upon further information from the plaintiff and further hearings, if required). I will not, however double (or treble) these costs and fees for the reasons discussed above. The punitive civil penalty is to punish the illegal actions of the WEA and is not intended as a reward or bonus to the PDC.

IV. THIS COURT DIRECTS THE WEA TO DEVELOP PROCEDURES TO IMPLEMENT THE AFFIRMATIVE AUTHORIZATION REQUIREMENTS OF RCW 41.27.760

This court must not only concern itself with the past violations of the statute but must also insure that the statute is followed in the future. During the course of trial and argument, it has been suggested by the WEA that this is an extremely difficult task and that other issues make compliance nearly impossible. The WEA argues that they cannot determine, in advance, the amounts that they will spend in a given year so that agency fee payers will not be charged the proportional amount. The PDC argues that amounts determined to be "nonchargeable" under the **Hudson** analysis don't account for other amounts that are "political". The PDC has stated that it is not seeking to have the WEA seek repeated affirmative authorizations and does not ask for a separate political fund to be set up. This court has already ruled that an affirmative authorization does not necessarily have to be in

writing. These issues, and others, do appear to be substantial in number and in substance. This court does not suggest that it has a sufficient understanding of either of the parties positions to fashion a remedy of its own at this point. On the other hand, this court is convinced that a procedure can be developed to assure compliance with the statute. Consequently, the court will give the WEA a period of 90 days from today's date to report back to the court with a proposal to assure compliance.

The PDC, in the court's opinion must also bear some responsibility in this task. It must provide the WEA assistance and feedback as the procedures are contemplated. This court expects that the parties will discuss and negotiate, and that consensus will be reached on as many details as possible. If the parties cannot agree, each side should provide suggested solutions for this court's consideration in arriving at a final procedure.

At the time of trial, the parties agreed to bifurcate the trial as to certain issues concerning specific expenditures or dollar amounts. This court is not prepared to rule at this time as to the nature of certain contested expenditures which may or may not be "political". Likewise, as previously noted, this court declines to rule on issues involving repayment or restitution amounts owed to individual fee payers.

There are no other issues, so far as the court is aware, that are ripe for this court's decision today.

CONCLUSION

This court today holds that the WEA has violated RCW 46.17.760 by using agency shop fees without affirmative authorization. The Court assesses a civil penalty of $200,000 against the WEA, finds that the violation was intentional, and doubles the penalty to $400,000 as a punitive sanction. The court also orders that appropriate costs for investigation and trial and attorney's fees be paid by the respondent; these amounts are not doubled and shall be specifically determined after further information and argument, if necessary. Finally, this court directs the WEA to develop, within 90 days, a plan to comply with the affirmative authorization requirements of the statute in the future. Because the Petitioner is the prevailing party, the PDC is directed to prepare and present an order for filing that reflects this court's decision as set forth in this letter opinion.

Sincerely,

Gary R. Tabor

Judge

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SUPERIOR COURT
THURSTON COUNTY WASH.
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BETTY J. GOULD CLERK
BY //s// DEPUTY

The Honorable Gary R. Tabor

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, ex. rel. WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, Plaintiff, vs. WASHINGTON EDUCATION ASSOCIATION, Defendant.	No. 00-2-01837-9 ORDER REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT Hearing Date: 5/4/01

THIS MATTER having come on for the Court's consideration based upon the Defendant's Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment, and the Court having considered records and files herein, the arguments of the parties in open court, and being otherwise fully advised; and the Court having considered the following:

1) Defendant's Motion for Summary Judgment;

2) Defendant's Memorandum in Support of Summary Judgment;

3) Declaration of Thomas Hedges;

4) Declaration of James S. Seibert and exhibits thereto;

5) Plaintiff's Memorandum in Response to Defendant's Motion for Summary Judgment and attachments thereto;

6) Declaration of D. Thomas Wendel for Defendant's Summary Judgment, and exhibits thereto;

7) Defendant's Reply Memorandum in Support of Summary Judgment;

8) Declaration of Harriet Strasberg (4/30/2001) and exhibits thereto;

9) Second Declaration of James S. Seibert;

10) Plaintiff's Motion for Partial Summary Judgment;

11) Memorandum Supporting Plaintiff's Motion for Partial Summary Judgment;

12) Declaration of D. Thomas Wendel for Partial Summary Judgment and exhibits thereto;

13) Defendant's Response to Plaintiff's Motion For Summary Judgment;

14) Declaration of Harriet Strasberg (4/23/2001) and exhibits thereto;

15) Declaration of James D. Oswald and exhibits thereto;

16) Plaintiff's Reply Memorandum for Partial Summary Judgment;

17) Declaration of D. Thomas Wendel for Summary Judgment Reply and exhibit thereto; and

18) Supplemental Declaration of D. Thomas Wendel for Summary Judgment Reply and exhibits thereto.

THE COURT HEREBY CONCLUDES AS FOLLOWS:

1. RCW 42.17.760 is constitutional.
2. RCW 42.17.760 does not unconstitutionally amend RCW 41.59.100.
3. RCW 41.17.760 requires affirmative authorization from agency fee payers, albeit not necessarily written by the fee payer, before Defendant may collect or use fees to influence an election or to support a political committee, and defendant's "Hudson" procedures do not satisfy this requirement.
4. Defendant has collected, without the required affirmative authorization, agency fees to be used to influence an election or to support a political committee.
5. There is an issue of fact whether Defendant in this case has, in fact, used agency fess to influence an election or to support a political committee.

ACCORDINGLY, IT IS HEREBY ORDERED THAT: Defendant's Motion for Summary judgment is DENIED; Plaintiff's Motion for Partial Summary Judgment is GRANTED, in part; and the issues set forth in paragraph 5 above shall be determined in the trial scheduled to begin on May 14, 2001.

DONE IN OPEN COURT this *10th* day of May, 2001.

//s//

Judge Gary R. Tabor

Presented by:

//s//

D. Thomas Wendel, WSBA #15445
Attorney for Plaintiff

Approved as to form,
Notice of Presentation Waived:

//s//

Judith A. Lonnquist, WSBA #06421
Attorney for Defendant

BEFORE THE
PUBLIC DISCLOSURE COMMISSION
OF THE STATE OF WASHINGTON

IN RE THE MATTER OF ENFORCEMENT ACTION AGAINST Washington Education Association, Respondent.	PDC Case No. 01-002 ORDER OF REFERRAL TO THE WASHINGTON STATE ATTORNEY GENERAL'S OFFICE

Staff of the Public Disclosure Commission submitted to the Commission a "Stipulation of Facts, Violations, and Recommendations" (Stipulation) dated September 25, 2000 in this matter. The Stipulation was signed by Vicki Rippie, PDC Executive Director, and Harriet Strasberg, Counsel, Washington Education Association (WEA). The Commission members considered the Stipulation on September 26, 2000 at a regular meeting. The parties were represented by Assistant Attorney General Stephen Reinmuth (representing Commission Staff), and attorney Ms. Strasberg (representing the Respondent WEA).

Following the presentation by Mr. Reinmuth of the Stipulation, and considering the comments of Ms. Strasberg, and after due deliberation, the Commission directed the following:

By a vote of 5-0, the Commission found that there are apparent multiple violations of

RCW 42.17.760 by the Respondent WEA, as has been acknowledged to by the parties in the Stipulation. The maximum penalty that can be assessed by the Commission is inadequate in light of the apparent violations. Therefore, in lieu of conducting an adjudicative proceeding and entering Findings of Fact, Conclusions of Law, and an Order, and considering the recommendation of the parties that this matter and Stipulation be referred to the Washington State Attorney General's Office for further review pursuant to RCW 42.17.395(3), the Commission hereby refers this case to the pursuant to RCW 42.17.360 and .395, and WAC 390-37-100, and incorporates the Stipulation by reference. To expedite this matter, the Executive Director is authorized to sign on behalf of the Commission.

//s//	*9/26/2000*
Vicki Rippie, Executive Director	Date Signed

Copies to be provided to:

Stephen Reinmuth, PDC Staff Attorney
Harriet Strasberg, Counsel for Respondent

BEFORE THE
PUBLIC DISCLOSURE COMMISSION
STATE OF WASHINGTON

IN THE MATTER OF THE ENFORCEMENT ACTION AGAINST Washington Education Association Respondent.	CASE NO. 01-002 STIPULATION OF FACTS, VIOLATIONS AND RECOMMENDATIONS

The Washington Education Association (Respondent) and Public Disclosure Commission Enforcement Staff (Staff) agree to the following:

1. The Respondent is a labor organization.
2. The Respondent deposited into its general fund agency fee money from 4,194 individuals.
3. The Respondent's general fund money was used to make contributions and expenditures to influence an election and to operate a political committee.
4. The Respondent did not have affirmative authorization from agency fee payers to use their money for these purposes.
5. The Respondent contends that the number of 4,194 is over-inclusive in that it includes

persons who were members of WEA and did not pay agency fees.

6. Staff contends that when Respondent submitted documents in response to a subpoena, a redacted list of 4,407 agency fee payers was presented. Names of the agency fee payers were redacted and replaced with a unique identification number for each agency fee payer. Of these, 4,407 individuals, 213 either filed objections or challenges to their funds being used for 'non-chargeable' expenditures and received a refund of the portion of their fees being used for non-chargeable purposes. The funds from the remaining 4,194 individuals were then transferred from the agency fee escrow account to WEA's general operating fund.

7. Staff were unable to determine the amount of agency fees used to make the contributions and expenditures referred to in paragraph 3 because WEA's final revenue figures for FY 2000 (September 1, 1999 through August 31, 2000) are not yet available.

Violation

Respondent and Staff agree that Respondent committed multiple violations of RCW 42.17.760.

Recommendation

Staff recommends that this matter be referred to the Office of the Attorney General for further

review pursuant to RCW 42.17.395(3). Respondent does not oppose the recommendation by staff.

Respectfully submitted this 25th day of September, 2000.

//s//	//s//
Vicki Rippie, Executive Director PDC	Harriet Strasberg, Counsel WEA

Wash. Rev. Code § 28B.52.045

Collective bargaining agreement–Exclusive bargaining representative–Union security provisions–Dues and fees

(1) Upon filing with the employer the voluntary written authorization of a bargaining unit employee under this chapter, the employee organization which is the exclusive bargaining representative of the bargaining unit shall have the right to have deducted from the salary of the bargaining unit employee the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership in the exclusive bargaining representative. Such employee authorization shall not be irrevocable for a period of more than one year. Such dues and fees shall be deducted from the pay of all employees who have given authorization for such deduction, and shall be transmitted by the employer to the employee organization or to the depository designated by the employee organization.

(2) A collective bargaining agreement may include union security provisions, but not a closed shop. If an agency shop or other union security provision is agreed to, the employer shall enforce any such provision by deductions from the salary of bargaining unit employees affected thereby and shall transmit such funds to the employee organization or to the depository designated by the employee organization.

(3) An employee who is covered by a union security provision and who asserts a right of

nonassociation based on bona fide religious tenets or teachings of a church or religious body of which such employee is a member shall pay to a nonreligious charity or other charitable organization an amount of money equivalent to the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership in the exclusive bargaining representative. The charity shall be agreed upon by the employee and the employee organization to which such employee would otherwise pay the dues and fees. The employee shall furnish written proof that such payments have been made. If the employee and the employee organization do not reach agreement on such matter, the commission shall designate the charitable organization.

Wash. Rev. Code § 41.06.150(11)(a)

Rules of board — Mandatory subjects — Personnel administration.

The board shall adopt rules, consistent with the purposes and provisions of this chapter, as now or hereafter amended, and with the best standards of personnel administration, regarding the basis and procedures to be followed for:

. . . .

(11) Collective bargaining procedures:

(a) After certification of an exclusive bargaining representative and upon the representative's request, the director shall hold

an election among employees in a bargaining unit to determine by a majority whether to require as a condition of employment membership in the certified exclusive bargaining representative on or after the thirtieth day following the beginning of employment or the date of such election, whichever is the later, and the failure of an employee to comply with such a condition of employment constitutes cause for dismissal: PROVIDED FURTHER, That no more often than once in each twelve-month period after expiration of twelve months following the date of the original election in a bargaining unit and upon petition of thirty percent of the members of a bargaining unit the director shall hold an election to determine whether a majority wish to rescind such condition of employment: PROVIDED FURTHER, That for purposes of this clause, membership in the certified exclusive bargaining representative is satisfied by the payment of monthly or other periodic dues and does not require payment of initiation, reinstatement, or any other fees or fines and includes full and complete membership rights: AND PROVIDED FURTHER, That in order to safeguard the right of nonassociation of public employees, based on bona fide religious tenets or teachings of a church or religious body of which such public employee is a member, such public employee shall pay to the union, for purposes within the program of the union as designated by such employee that would be in harmony with his or her individual conscience, an amount of money equivalent to regular union dues minus any included monthly

premiums for union-sponsored insurance programs, and such employee shall not be a member of the union but is entitled to all the representation rights of a union member;

Wash. Rev. Code § 41.80.100

Union security — Fees and dues — Right of nonassociation.

(1) A collective bargaining agreement may contain a union security provision requiring as a condition of employment the payment, no later than the thirtieth day following the beginning of employment or July 1, 2004, whichever is later, of an agency shop fee to the employee organization that is the exclusive bargaining representative for the bargaining unit in which the employee is employed. The amount of the fee shall be equal to the amount required to become a member in good standing of the employee organization. Each employee organization shall establish a procedure by which any employee so requesting may pay a representation fee no greater than the part of the membership fee that represents a pro rata share of expenditures for purposes germane to the collective bargaining process, to contract administration, or to pursuing matters affecting wages, hours, and other conditions of employment.

(2) An employee who is covered by a union security provision and who asserts a right of nonassociation based on bona fide religious tenets, or teachings of a church or religious body of which the

employee is a member, shall, as a condition of employment, make payments to the employee organization, for purposes within the program of the employee organization as designated by the employee that would be in harmony with his or her individual conscience. The amount of the payments shall be equal to the periodic dues and fees uniformly required as a condition of acquiring or retaining membership in the employee organization minus any included monthly premiums for insurance programs sponsored by the employee organization. The employee shall not be a member of the employee organization but is entitled to all the representation rights of a member of the employee organization.

(3) Upon filing with the employer the written authorization of a bargaining unit employee under this chapter, the employee organization that is the exclusive bargaining representative of the bargaining unit shall have the exclusive right to have deducted from the salary of the employee an amount equal to the fees and dues uniformly required as a condition of acquiring or retaining membership in the employee organization. The fees and dues shall be deducted each pay period from the pay of all employees who have given authorization for the deduction and shall be transmitted by the employer as provided for by agreement between the employer and the employee organization.

(4) Employee organizations that before July 1, 2004, were entitled to the benefits of this section shall continue to be entitled to these benefits.

Wash. Rev. Code § 41.56.122(1)

Collective bargaining agreements Authorized provisions.

A collective bargaining agreement may:

(1) Contain union security provisions: PROVIDED, That nothing in this section shall authorize a closed shop provision: PROVIDED FURTHER, That agreements involving union security provisions must safeguard the right of nonassociation of public employees based on bona fide religious tenets or teachings of a church or religious body of which such public employee is a member. Such public employee shall pay an amount of money equivalent to regular union dues and initiation fee to a nonreligious charity or to another charitable organization mutually agreed upon by the public employee affected and the bargaining representative to which such public employee would otherwise pay the dues and initiation fee. The public employee shall furnish written proof that such payment has been made. If the public employee and the bargaining representative do not reach agreement on such matter, the commission shall designate the charitable organization. When there is a conflict between any collective bargaining agreement reached by a public employer and a bargaining representative on a union security provision and any charter, ordinance, rule, or regulation adopted by the public employer or its agents, including but not limited to, a civil service

commission, the terms of the collective bargaining agreement shall prevail.

Wash. Rev. Code § 41.59.060

Employee rights enumerated — Fees and dues, deduction from pay.

(1) Employees shall have the right to self-organization, to form, join, or assist employee organizations, to bargain collectively through representatives of their own choosing, and shall also have the right to refrain from any or all of such activities except to the extent that employees may be required to pay a fee to any employee organization under an agency shop agreement authorized in this chapter.

(2) The exclusive bargaining representative shall have the right to have deducted from the salary of employees, upon receipt of an appropriate authorization form which shall not be irrevocable for a period of more than one year, an amount equal to the fees and dues required for membership. Such fees and dues shall be deducted monthly from the pay of all appropriate employees by the employer and transmitted as provided for by agreement between the employer and the exclusive bargaining representative, unless an automatic payroll deduction service is established pursuant to law, at which time such fees and dues shall be transmitted as therein provided. If an agency shop provision is agreed to and becomes effective pursuant to RCW 41.59.100, except as provided in that section, the

agency fee equal to the fees and dues required of membership in the exclusive bargaining representative shall be deducted from the salary of employees in the bargaining unit.

Wash. Rev. Code § 41.59.100

Union security provisions — Scope — Agency shop provision, collection of dues or fees.

A collective bargaining agreement may include union security provisions including an agency shop, but not a union or closed shop. If an agency shop provision is agreed to, the employer shall enforce it by deducting from the salary payments to members of the bargaining unit the dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues. All union security provisions must safeguard the right of nonassociation of employees based on bona fide religious tenets or teachings of a church or religious body of which such employee is a member. Such employee shall pay an amount of money equivalent to regular dues and fees to a nonreligious charity or to another charitable organization mutually agreed upon by the employee affected and the bargaining representative to which such employee would otherwise pay the dues and fees. The employee shall furnish written proof that such payment has been made. If the employee and the bargaining representative do not reach agreement on such matter, the commission shall designate the charitable organization.

Wash. Rev. Code § 42.17.360(5)

Commission — Duties.

The commission shall:

. . . .

(5) Upon complaint or upon its own motion, investigate and report apparent violations of this chapter to the appropriate law enforcement authorities;

Wash. Rev. Code § 42.17.390(4), (6)

Civil remedies and sanctions.

One or more of the following civil remedies and sanctions may be imposed by court order in addition to any other remedies provided by law:

. . . .

(4) Any person who fails to file a properly completed statement or report within the time required by this chapter may be subject to a civil penalty of ten dollars per day for each day each such delinquency continues.

. . . .

(6) The court may enjoin any person to prevent the doing of any act herein prohibited, or to compel the performance of any act required herein.

Wash. Rev. Code § 42.17.395

Violations — Determination by commission — Procedure.

(1) The commission may (a) determine whether an actual violation of this chapter has occurred; and (b) issue and enforce an appropriate order following such determination.

(2) The commission, in cases where it chooses to determine whether an actual violation of this chapter has occurred, shall hold a hearing pursuant to the Administrative Procedure Act, chapter 34.05 RCW, to make such determination. Any order that the commission issues under this section shall be pursuant to such hearing.

(3) In lieu of holding a hearing or issuing an order under this section, the commission may refer the matter to the attorney general or other enforcement agency as provided in RCW 42.17.360.

(4) The person against whom an order is directed under this section shall be designated as the respondent. The order may require the respondent to cease and desist from the activity that constitutes a violation and in addition, or alternatively, may impose one or more of the remedies provided in *RCW 42.17.390(1) (b), (c), (d), or (e): PROVIDED, That no individual penalty assessed by the commission may exceed one thousand dollars, and in any case where multiple violations are involved in a

single complaint or hearing, the maximum aggregate penalty may not exceed two thousand five hundred dollars.

(5) An order issued by the commission under this section shall be subject to judicial review under the Administrative Procedure Act, chapter 34.05 RCW. If the commission's order is not satisfied and no petition for review is filed within thirty days as provided in RCW 34.05.542, the commission may petition a court of competent jurisdiction of any county in which a petition for review could be filed under that section, for an order of enforcement. Proceedings in connection with the commission's petition shall be in accordance with RCW 42.17.397.

Wash. Rev. Code § 42.17.400

Enforcement.

(1) The attorney general and the prosecuting authorities of political subdivisions of this state may bring civil actions in the name of the state for any appropriate civil remedy, including but not limited to the special remedies provided in RCW 42.17.390.

(2) The attorney general and the prosecuting authorities of political subdivisions of this state may investigate or cause to be investigated the activities of any person who there is reason to believe is or has been acting in violation of this chapter, and may require any such person or any other person reasonably believed to have information concerning the activities of such person to appear at a time and

place designated in the county in which such person resides or is found, to give such information under oath and to produce all accounts, bills, receipts, books, paper and documents which may be relevant or material to any investigation authorized under this chapter.

(3) When the attorney general or the prosecuting authority of any political subdivision of this state requires the attendance of any person to obtain such information or the production of the accounts, bills, receipts, books, papers, and documents which may be relevant or material to any investigation authorized under this chapter, he shall issue an order setting forth the time when and the place where attendance is required and shall cause the same to be delivered to or sent by registered mail to the person at least fourteen days before the date fixed for attendance. Such order shall have the same force and effect as a subpoena, shall be effective statewide, and, upon application of the attorney general or said prosecuting authority, obedience to the order may be enforced by any superior court judge in the county where the person receiving it resides or is found, in the same manner as though the order were a subpoena. The court, after hearing, for good cause, and upon application of any person aggrieved by the order, shall have the right to alter, amend, revise, suspend, or postpone all or any part of its provisions. In any case where the order is not enforced by the court according to its terms, the reasons for the court's actions shall be clearly stated in writing, and such action shall be subject to review by the

appellate courts by certiorari or other appropriate proceeding.

(4) Any person who has notified the attorney general and the prosecuting attorney in the county in which the violation occurred in writing that there is reason to believe that some provision of this chapter is being or has been violated may himself bring in the name of the state any of the actions (hereinafter referred to as a citizen's action) authorized under this chapter. This citizen action may be brought only if the attorney general and the prosecuting attorney have failed to commence an action hereunder within forty-five days after such notice and such person has thereafter further notified the attorney general and prosecuting attorney that said person will commence a citizen's action within ten days upon their failure so to do, and the attorney general and the prosecuting attorney have in fact failed to bring such action within ten days of receipt of said second notice. If the person who brings the citizen's action prevails, the judgment awarded shall escheat to the state, but he shall be entitled to be reimbursed by the state of Washington for costs and attorney's fees he has incurred: PROVIDED, That in the case of a citizen's action which is dismissed and which the court also finds was brought without reasonable cause, the court may order the person commencing the action to pay all costs of trial and reasonable attorney's fees incurred by the defendant.

(5) In any action brought under this section, the court may award to the state all costs of investigation and trial, including a reasonable

attorney's fee to be fixed by the court. If the violation is found to have been intentional, the amount of the judgment, which shall for this purpose include the costs, may be trebled as punitive damages. If damages or trebled damages are awarded in such an action brought against a lobbyist, the judgment may be awarded against the lobbyist, and the lobbyist's employer or employers joined as defendants, jointly, severally, or both. If the defendant prevails, he shall be awarded all costs of trial, and may be awarded a reasonable attorney's fee to be fixed by the court to be paid by the state of Washington.

Wash. Rev. Code § 42.17.610

Findings.

The people of the state of Washington find and declare that:

(1) The financial strength of certain individuals or organizations should not permit them to exercise a disproportionate or controlling influence on the election of candidates.

(2) Rapidly increasing political campaign costs have led many candidates to raise larger percentages of money from special interests with a specific financial stake in matters before state government. This has caused the public perception that decisions of elected officials are being improperly influenced by monetary contributions.

(3) Candidates are raising less money in small contributions from individuals and more money from special interests. This has created the public perception that individuals have an insignificant role to play in the political process.

Wash. Rev. Code § 42.17.620

Intent.

By limiting campaign contributions, the people intend to:

(1) Ensure that individuals and interest groups have fair and equal opportunity to influence elective and governmental processes;

(2) Reduce the influence of large organizational contributors; and

(3) Restore public trust in governmental institutions and the electoral process.

Wash. Rev. Code § 42.17.760

Agency shop fees as contributions.

A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

Wash. Rev. Code § 42.17.955

Short title — 1993 c 2.

This act may be known and cited as the Fair Campaign Practices Act.

29 U.S.C.A. § 164(b)

. . . .

(b) Agreements requiring union membership in violation of State law

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

2 U.S.C.A. § 441b

Contributions or expenditures by national banks, corporations, or labor organizations.

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any

candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b)(1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79l(h) of Title 15, the term "contribution or expenditure" includes a contribution or expenditure, as those terms are defined in section 431 of this title, and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication, but

shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4)(A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under

this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any

such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

(c) Rules relating to electioneering communications

(1) Applicable electioneering communication

For purposes of this section, the term "applicable electioneering communication" means an electioneering communication (within the meaning of section 434(f)(3) of this title) which is made by any entity described in subsection (a) of this section or by any other person using funds donated by an entity described in subsection (a) of this section.

(2) Exception

Notwithstanding paragraph (1), the term "applicable electioneering communication" does not include a communication by a section 501(c)(4) organization or a political organization (as defined in section 527(e)(1) of Title 26) made under section 434(f)(2)(E) or (F) of this title if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8). For purposes of the preceding sentence, the term "provided directly by individuals" does not include funds the source of which is an entity described in subsection (a) of this section.

(3) Special operating rules

(A) Definition under paragraph (1)

An electioneering communication shall be treated as made by an entity described in subsection (a) of this section if an entity described in subsection (a) of this section directly or indirectly disburses any amount for any of the costs of the communication.

(B) Exception under paragraph (2)

A section 501(c)(4) organization that derives amounts from business activities or receives funds from any entity described in subsection (a) of this section shall be considered to have paid for any communication out of such amounts unless such organization paid for the communication out of a segregated account to which only individuals can contribute, as described in section 434(f)(2)(E) of this title.

(4) Definitions and rules

For purposes of this subsection--

(A) the term "section 501(c)(4) organization" means--

(i) an organization described in section 501(c)(4) of Title 26 and exempt from taxation under section 501(a) of such title; or

(ii) an organization which has submitted an application to the Internal

Revenue Service for determination of its status as an organization described in clause (i); and

(B) a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(5) Coordination with Title 26

Nothing in this subsection shall be construed to authorize an organization exempt from taxation under section 501(a) of Title 26 to carry out any activity which is prohibited under such title.

(6) Special rules for targeted communications

(A) Exception does not apply

Paragraph (2) shall not apply in the case of a targeted communication that is made by an organization described in such paragraph.

(B) Targeted communication

For purposes of subparagraph (A), the term "targeted communication" means an electioneering communication (as defined in section 434(f)(3) of this title) that is distributed from a television or radio broadcast station or provider of cable or satellite television service and, in the case of a communication which refers to a candidate for

an office other than President or Vice President, is targeted to the relevant electorate.

(C) Definition

For purposes of this paragraph, a communication is "targeted to the relevant electorate" if it meets the requirements described in section 434(f)(3)(C) of this title.11 C.F.R. § 114.5

11 C.F.R. § 114.6

Twice yearly solicitations.

(a) A corporation and/or its separate segregated fund may make a total of two written solicitations for contributions to its separate segregated fund per calendar year of its employees other than stockholders, executive or administrative personnel, and their families. Employees as used in this section does not include former or retired employees who are not stockholders. Nothing in this paragraph shall limit the number of solicitations a corporation may make of its stockholders and executive or administrative personnel under § 114.5(g).

(b) A labor organization and/or its separate segregated fund may make a total of two written solicitations per calendar year of employees who are not members of the labor organization, executive or administrative personnel, or stockholders (and their families) of a corporation in which the labor organization represents members working for the corporation. Nothing in this paragraph shall limit the number of solicitations a labor organization may make of its members under § 114.5(g).

(c) Written solicitation. A solicitation under this section may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residences. All written solicitations must inform the recipient--

(1) Of the existence of the custodial arrangement described hereinafter;

(2) That the corporation, labor organization, or the separate segregated fund of either cannot be informed of persons who do not make contributions; and

(3) That persons who, in a calendar year make a single contribution of $50 or less, or multiple contributions aggregating $200 or less may maintain their anonymity by returning their contributions to the custodian.

(d) The custodial arrangement. In order to maintain the anonymity of persons who do not wish to contribute and of persons who wish to respond with a single contribution of $50 or less, or multiple contributions aggregating $200 or less in a calendar year, and to satisfy the recordkeeping provisions, the corporation, labor organization, or separate segregated fund of either shall establish a custodial arrangement for collecting the contributions under this section.

(1) The custodian for a separate segregated fund established by a corporation shall not be a stockholder, officer, executive or administrative personnel, or employee of the corporation, or an officer, or employee of its separate segregated fund. The custodian for a separate segregated fund established by a labor organization shall not be a member, officer or employee of the labor organization or its separate segregated fund.

(2) The custodian shall keep the records of contributions received in accordance with the requirements of Part 102 and shall also--

(i) Establish a separate account and deposit contributions in accordance with the provisions of Part 103;

(ii) Provide the fund with the identification of any person who makes a single contribution of more than $50 and the identification of any person who makes multiple contributions aggregating more than $200. The custodian must provide this information within a reasonable time prior to the reporting date of the fund under Part 104;

(iii) Periodically forward all funds in the separate account, by check drawn on that account, to the separate segregated fund; and

(iv) Treat all funds which appear to be illegal in accordance with the provisions of § 103.3(b).

(3) The custodian shall not--

(i) Make the records of persons making a single contribution of $50 or less, or multiple contributions aggregating $200 or less, in a calendar year, available to any person other than representatives of the Federal Election Commission or the Secretary of the Senate, as

appropriate, and law enforcement officials or judicial bodies.

(ii) Provide the corporation or labor organization or the separate segregated fund of either with any information pertaining to persons who, in a calendar year, make a single contribution of $50 or less or multiple contributions aggregating $200 or less except that the custodian may forward to the corporation, labor organization or separate segregated fund of either the total number of contributions received; or

(iii) Provide the corporation, labor organization, or the separate segregated fund of either with any information pertaining to persons who have not contributed.

(4) The corporation, labor organization, or the separate segregated fund of either shall provide the custodian with a list of all contributions, indicating the contributor's identification and amount contributed, which have been made directly to the separate segregated fund by any person within the group of persons solicited under this section.

(5) Notwithstanding the prohibitions of paragraph (d)(1) of this section, the custodian may be employed by the separate segregated fund as its treasurer and may handle all of its contributions, provided that the custodian preserves the anonymity of the contributors as

required by this section. The custodian shall file the required reports with the Federal Election Commission or the Secretary of the Senate, as appropriate. A custodian who serves as treasurer is subject to all of the duties, responsibilities, and liabilities of a treasurer under the Act, and may not participate in the decision making process whereby the separate segregated fund makes contributions and expenditures.

(e) Availability of methods.

(1) A corporation or labor organization or the separate segregated fund of either may not use a payroll deduction plan, a check-off system, or other plan which deducts contributions from an employee's paycheck as a method of facilitating the making of contributions under this section.

(2) The twice yearly solicitation may only be used by a corporation or labor organization to solicit contributions to its separate segregated fund and may not be used for any other purpose.

(3) A corporation is required to make available to a labor organization representing any members working for the corporation or its subsidiaries, branches, divisions, or affiliates the method which the corporation uses to solicit employees under this section during any calendar year.

(i) If the corporation uses a method to solicit any employees under this section, the corporation is required to make that method

available to the labor organization to solicit the employees of the corporation who are not represented by that labor organization, and the executive or administrative personnel and the stockholders of the corporation and their families.

(ii) If the corporation does not wish to disclose the names and addresses of stockholders or employees, the corporation shall make the names and addresses of stockholders and employees available to an independent mailing service which shall be retained to make the mailing for both the corporation and the labor organization for any mailings under this section.

(iii) If the corporation makes no solicitation of employees under this section during the calendar year, the corporation is not required to make any method or any names and addresses available to any labor organization.

(4) The corporation shall notify the labor organization of its intention to make a solicitation under this section during a calendar year and of the method it will use, within a reasonable time prior to the solicitation, in order to allow the labor organization opportunity to make a similar solicitation.

(5) If there are several labor organizations representing members employed at a single

corporation, its subsidiaries, branches, divisions, or affiliates, the labor organizations, either singularly or jointly, may not make a combined total of more than two written solicitations per calendar year. A written solicitation may contain a request for contributions to each separate fund established by the various labor organizations making the combined mailing.